128-91

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.8

No. ~~84.~~ 8

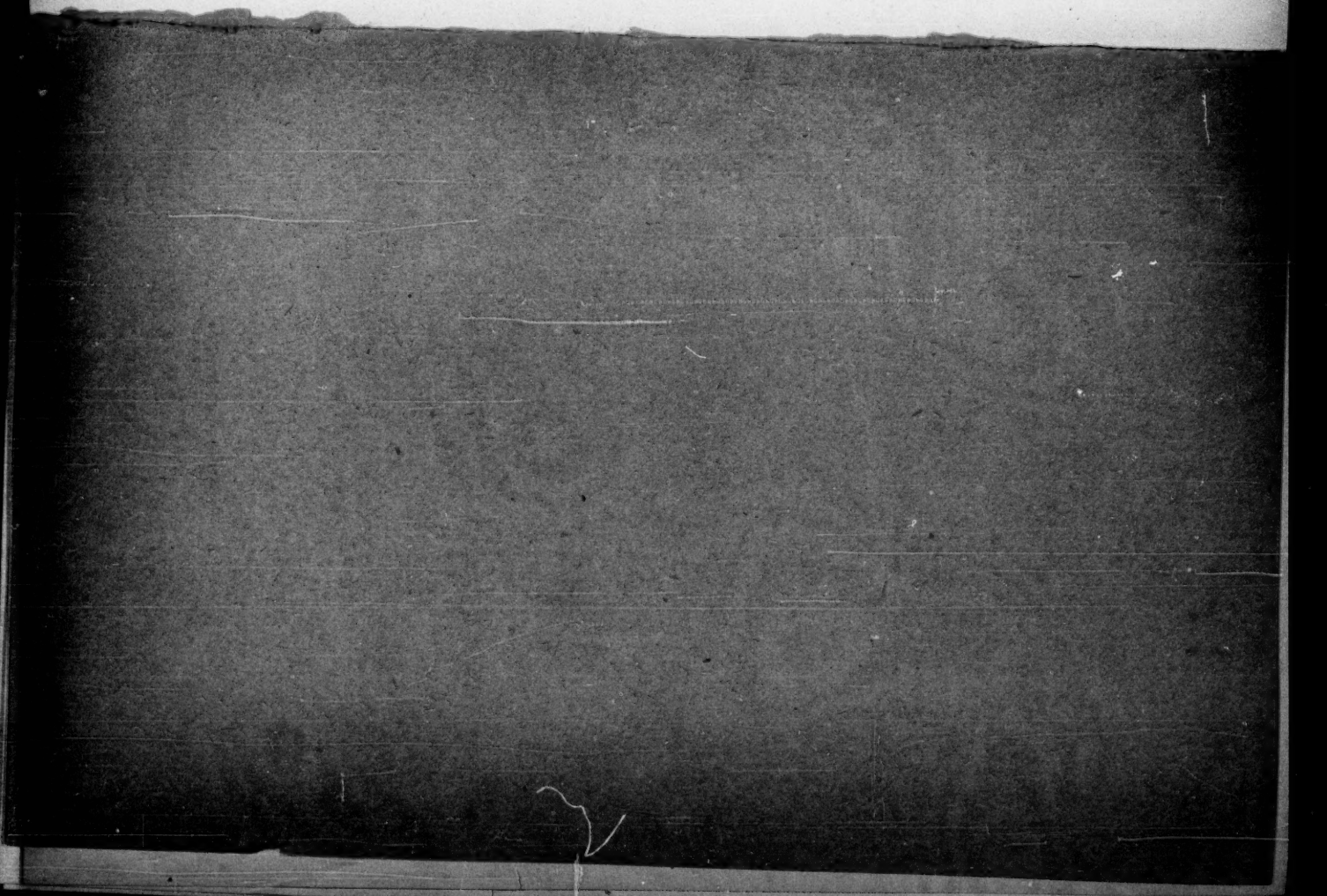
EDWARD KANE, PLAINTIFF IN ERROR,

vs.

THE NORTHERN CENTRAL RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 10, 1884.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 84.

EDWARD KANE, PLAINTIFF IN ERROR,

vs.

THE NORTHERN CENTRAL RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation	2	1
Summons and return thereto	4	2
Narr.	6	3
Plea	13	5
Calling of a jury	14	5
Verdict	14	6
Motion and reasons for a new trial	15	6
Argued on motion for a new trial	17	6
Motion for a new trial denied	17	6
Judgment	17	6
Bill of exceptions	18	7
Plaintiff's evidence	18	7
Deposition of Edward Kane	19	7
Frank Cresswell	38	13
Charge of the court	44	15
Bond surwrit of error	51	17
Clerk's certificate	53	18

JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 10, 1887.

1 UNITED STATES, } *sct:*
Eastern District of Pennsylvania, }

The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, Greeting:

Because that in the record and process and also in the rendering of judgment in a suit before you between Edward Kane, a citizen of the State of Maryland, plaintiff, and Northern Central Railway Company, a corporation duly incorporated and existing under the laws of the State of Pennsylvania, defendant, in a plea of trespass on the case, a manifest error has intervened, to the great damage of the said Edward Kane, as in his complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then, under your seal, you do, distinctly and openly, send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the honorable the justices of the Supreme Court of the United States, sitting at Washington, D. C., on the second Monday of October next, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 23rd day of April, A. D. one thousand eight hundred and eighty-four, and in the one hundred and eighth year of the Independence of the said United States.

[Seal of U. S. Circuit Court, E. D. Pennsylvania.]

SAMUEL BELL,
Clerk of Circuit Court U. S.

2 THE UNITED STATES OF AMERICA, *ss:*

To the Northern Central Railway Company, a corporation duly incorporated and existing under the laws of the State of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein Edward Kane, a citizen of the State of Maryland, — plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 16th day of July, in the year of our Lord one thousand eight hundred and eighty-four.

WM. BUTLER, *Judge.*

I accept service of above citation.

WAYNE MACVEAGH,
Def't's Att'y.

Please enter my appearance for defendant in error.
July 18, '84.

WAYNE MACVEAGH.

To cl'k Sup. C't U. S.

3 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

EDWARD KANE, a Citizen of the State of Maryland,

vs.

NORTHERN CENTRAL RAILWAY COMPANY, a Corporation duly incorporated and existing under the Laws of the State of Pennsylvania.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, } *ss:*

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit of October session, 1880, No. 86.

It is thus contained:

Be it remembered that on the 24th day of February, A. D. 1881, Edward Kane, by his attorneys, James H. Gable and W. F. Bay Stewart, Esquires, comes into our court here and sues forth therefrom a writ of summons against the Northern Central Railway Company which, with the endorsement and return thereto, is in the words and figures following, to wit:

4 UNITED STATES,
Eastern District of Pennsylvania, } *sct:*

The President of the United States to the marshal of the eastern district of Pennsylvania, Greeting:

We command you that you summon Northern Central Railway Company, a corporation duly incorporated and existing under the laws of the State of Pennsylvania, late of your district, if it may be found therein, so that it be and appear before the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, of the third circuit, at a session of the same court to be holden in Philadelphia on the first Monday of March next, to answer to Edward Kane, a citizen of the State of Maryland, in a plea of trespass on the case; and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this twenty-

fourth day of February, A. D. 1881, and in the 105th year of the Independence of the United States.

[SEAL.] W. VON A. WILLIAMSON,
Pro. Clerk of Circuit Court, U. S.

5 FEB'Y 25TH, 1881.

At Philadelphia, in my district, served the within writ on the Northern Central Railway Company by giving a true and attested copy of the same to Stephen W. White, secretary of said company, and making known the contents thereof to him.

So answers—

JAMES M. KERNS,
U. S. Marshal,
P. C. McCORMICK, *Deputy.*

(Endorsed:) No. 86. Circuit court, Oct. session, 1880. Kane *vs.* Northern Central Railway Co. Summons. Case returnable on the first Monday of March next. Jas. H. Gable, W. F. Bay Stewart, attorneys for plaintiff. Returned. Filed March 7, 1881.

6 And afterwards, to wit, on the 24th day of February, A. D. 1881, the plaintiff, by his attorneys, comes into court here and files his narr, in the words following, to wit:

In the Circuit Court of the United States for the Eastern District of Penna.

EDWARD KANE
vs.
THE NORTHERN CENTRAL RAILWAY COMPANY.

Edward Kane, a citizen of the State of Maryland, by his attorneys, James H. Gable and W. F. Bay Stewart, complains of the Northern Central Railway Company, a corporation duly incorporated by and a citizen of the State of Pennsylvania, the defendant in this suit, which has been summoned to answer the said plaintiff in an action of trespass on the case: For that whereas heretofore, to wit, on the twenty-ninth day of February, A. D. one thousand eight hundred and seventy-six, the said defendant was the owner and operator of a certain railroad, known as the "Northern Central railway,"
7 in the State of Pennsylvania, and as such owner and operator was on the day and year aforesaid, by its officers, agents, and employees, running, operating, and propelling a certain train of cars, to wit, a train of fifty cars loaded and conveying freight on and along the said railroad by means of a certain locomotive and steam engine thereto attached, which said engine and locomotive was managed and controlled by the employees of the said defendant; and whereas the said plaintiff was then and there also on the day and year aforesaid an employe and servant of the said defendants engaged and employed by the said defendant as a brakesman to assist as such brakesman in running the said freight train of the said defendant; and whereas the said defendant as

such railroad company and employer of the said plaintiff was in duty bound to furnish safe and proper machinery and cars with suitable, safe, and proper steps to and upon such cars for the passage and reasonable convenience of the said plain-
8 tiff as such brakesman, to pass and repass to and from one car to another in the said freight train, in the discharge and performance of his duty and employment as such brakesman, yet the said defendant, not regarding its duty in that behalf, did negligently, carelessly, and improperly put and place in the *in the* said freight train of cars one certain house-car, which said house-car was not supplied with steps for the purpose aforesaid, by reason whereof and for the want of which steps the said plaintiff, although exercising due and proper care & diligence, while passing from the said house-car, so negligently and improperly put and placed in the said freight train as aforesaid without said suitable and proper steps, as aforesaid, by the negligence and want of care of said defendant, to the next car in front thereof, while in the proper discharge of his duty as brakesman on the said train, at Glatfelter's station, in the county of York, Penna., and while said train
9 was moving fell from the said house-car, so negligently placed as aforesaid in said train by said defendant, and was then and there by reason of said defendant's *and* want of care in that behalf greatly injured in his person, to wit, the loss of both of his legs, and was also deprived of the means of earning a livelyhood for himself and family at his usual occupation of a railroad employee, and also suffered and still continues to suffer great mental distress and bodily anguish, and was also thereby deprived of his reasonable prospects of continuance and promotion in the line of service as a railway employee; in all of which said deprivations and sufferings the said plaintiff was greatly injured and has sustained large damages, to wit, the sum of twenty thousand dollars.

And for that whereas the defendant, being a body corporate and duly incorporated under the laws of the State of Pennsylvania and owning and operating a railroad by steam locomotion, commonly known as the "Northern Central Railway," having employed
10 the plaintiff and engaged his services as a brakesman to assist in running the defendant's freight trains between the station of Marysville, on the said railway, and the city of Baltimore, one of the termini of said railway; and whereas the plaintiff, being so engaged in the service of and the employ of the defendant, on or about the night of the 29th of February, A. D. 1876, and while assisting in the operating and running of one of the defendant's freight trains as brakesman as aforesaid at or near Gladfelter's station, on said railway, in York county, in the State of Pennsylvania, and while in the discharge of his duty as such brakesman, and while in the act of passing from one of the house or box cars of the said freight train to the car next in front thereof, and by means of there being no step on the end of said house or box car next the car in front thereof in the proper and accustomed place for such step and where such step should and ought of right to have
11 been, and by means of the negligence of and the want of due

and proper care on the part of the defendant in not having provided for and in not having put a step on the end of said house or box car next the car in front thereof as aforesaid, and without any negligence or want of proper care on his part, plaintiff fell and was injured and suffered serious bodily hurt, to wit, the loss of both his legs; and whereby the plaintiff has suffered great bodily pain and mental anguish, and whereby the plaintiff's health has been seriously impaired, and whereby the plaintiff has been deprived of the means of earning a livelihood for himself and family in his usual and accustomed occupation and employment aforesaid, and also of all chance or prospect of promotion in his line of service as a railroad employee, to the great damage of the plaintiff, to wit the sum twenty thousand dollars.

JAS. H. GABLE,
W. F. BAY STEWART,
Attorney- for Pl'ff.

12 Endorsed: No. 86. October sess., 1880, C. C. U. S., E. D. of Pa. Edward Kane *vs.* Northern Central Railway Company. Narr. To clerk C. C. U. S. Filed February 24, 1881. W. Dubois Miller, W. F. Bay Stewart, York, Penna.; Jas. H. Gable, 46 St. Paul St., Balto., Md.

13 And afterwards, to wit, on the 6th day of May, A. D. 1881, the defendant, by its attorney, comes into court here and files his plea in the words following, to wit:

Circuit Court of U. S. October Sessions, 1880.

KANE
vs.
NORTHERN CENT. RAILWAY. } No. 86.

MAY 6, 1881.

Defendant pleads not guilty.

WAYNE MACVEAGH.

To clerk U. S. C. C.

(Endorsed:) 86. October sess., 1880. Kane *vs.* North. Cent. Railway Co. C. C. U. S. Plea. Filed May 6, '81. MacVeagh.

14 And thereupon it is ordered that a jury come to try the the issue joined in this case.

And afterwards, to wit, on the 12th day of April, A. D. 1882, come the parties aforesaid, and the jurors of the jury aforesaid being called likewise come, to wit:

1 James G. Shoemaker.
2 George F. Gale.
3 Charles Ashbridge.
4 Samuel J. Levick.
5 J. Hayes Linville.
6 William O. Robb.
7 Thomas Reese.
8 Richard Dale.
9 Nathaniel Ellmaker.
10 Alfred S. Dingman.
11 Oliver Landreth.
12 William Cromwell.

Who are duly impanelled, returned, chosen, tried, and sworn or affirmed to speak the truth, &c., in the issue joined in this case.

And afterwards, to wit, on the day and year last aforesaid, the jurors aforesaid, upon their oaths or affirmations aforesaid, respectively, do say that they find for the defendant.

15 And afterwards, to wit, on the day and year last aforesaid, the plaintiff, by his attorneys, come- into our said court here and move- the court for a new trial and file- the following reasons therefor, to wit:

C. C. U. S. Oct. Sess., 1880.

KANE
vs.
NORTH'N CENTRAL RAILWAY CO. } No. 86.

And now, April 13th, 1882, on motion of counsel for plaintiff, the court grants a motion on defendant to show cause why a new trial should not be granted in the above cause, without prejudice to plaintiff's right to have a bill of exceptions and to take a writ of error to the Supreme Court of the United States.

Reasons for New Triat.

1. Because the learned judge erred in holding that under the evidence the plaintiff was guilty of contributory negligence.

16 2. Because the learned judge erred in charging the jury that under the evidence in the cause they must find a verdict for the defendant.

(Endorsed:) 86. Oct. sess., 1880. Kane *vs.* North. Cent. R. W. Co. Motion for rule to show cause why new trial should not be granted. Filed April 13, 1882. Miller, Gabell, Stewart.

17 And afterwards, to wit, on the 21st day of April, A. D. 1882, come the parties aforesaid, by their attorneys aforesaid, and this cause being called for argument on motion for a new trial, and having been argued by counsel for the respective parties, and the court not being fully advised in the premises, takes further time to consider thereof.

And afterwards, to wit, on the 24th day of April, A. D. 1882, come the parties aforesaid, by their attorneys aforesaid, and the court being now fully advised in the premises, orders that the motion for a new trial be denied and judgment entered on the verdict in favor of defendant and against the plaintiff.

Whereupon judgment is entered accordingly.

And afterwards, to wit, on the 20th day of June, A. D. 1882, the plaintiff, by his attorneys, comes into court here and files his bill of exceptions, the same having been sealed by the said court, is in the words following, to wit:

18 Be it remembered that in the April session, A. D. 1882, came Edward Kane, a citizen of the State of Maryland, into the circuit court of the United States for the eastern district of Pennsylvania, and impleaded the Northern Central Railway Company, a citizen of the State of Pennsylvania, in a certain plea of trespass on the case, &c., in which the said Edward Kane declared (*prout* narr.), and the said, The Northern Central Railway Company pleaded (*prout* pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the session aforesaid, before the Honorable William Butler, judge of the said court, on the twelfth day of April, A. D. 1882, the aforesaid issue between the said parties came to be tried by a jury of the said district for that purpose duly impanelled (*prout* list of jurors); at which day came as well the said plaintiff as the said defendant, by their respective attorneys, and the jurors of the jury aforesaid impanelled to try the said issue, being also called, came and were then and there in due manner chosen and sworn or affirmed to try the said issue, and upon the trial the counsel of the said defendant admitted the company defendant to be a corporation duly incorporated under the laws of the State of Pennsylvania; and

19 thereupon counsel for the said plaintiff called Edward Kane, who, being duly sworn, testified as follows:

I am the plaintiff in this case. I am 31 y'rs of age and reside in Baltimore county, Maryland. On the 11th of Feb'y, 1875, I went as brakeman on the Northern Central R. W. and remained in the service until the 29th of February, 1876. About half past 12 o'clock on the 29th of February, 1876, I left Marysville on the coal train South as brakeman; we got the train at Marysville; at the water-plug at York Haven I noticed the step being off the first car; I called the other brakeman's attention to it; before we got into York, going down grade, I was obliged to cross over the cars; when we got into York I spoke to the conductor about it; I left York with the train, as I should do, on the rear end; at Coldfelters the train stopped to take water; going into Coldfelters going South the train don't require any brake; while the engineer or fireman or whoever did it put the water into the engine I went into the caboose; coming into Coldfelters you don't need any brake no more than putting one brake on the train coming South; going North you have to

20 do some braking down grade; there was no occasion for me to climb over the cars there to stop the train; the train was stopped and taking water; I don't know how long they laid there; I went out over the caboose to go into my train, from Coldfelters to Baltimore; going over this car again I went to come down over the end the step was off; the step was off was the reason of my falling; when I fell over to the platform I slipped right from that between the wheels in between the couplings; I had been in the service before the accident 12 mos. and 18 days; the service is by the trip; we are paid the 13th of every month, but the wages are rated by the trip—$1.80 from Baltimore to Marysville and $1.80 from Marysville

to Baltimore; the distance is 91 miles; the train was made up in the yard at Marysville by the conductor, myself, and Frank Cresswell, the other brakeman; the dispatchers have charge of the yard and charge of the men at Marysville; they order the cars for putting the trains together and give the manifest to the conductor; he tells when to get the cars, what tracks and how many; I did not
21 know anything of the condition of this particular car and did not notice it until going into York Haven; I was going over the train to put the brakes down; I called the attention of the conductor to it.

And thereupon counsel for defendant objected to the witness stating the conversation between the conductor and witness, and the witness continued:

"I mentioned to the conductor at York about the cars; that the fourth car from the caboose was a Hunter car and was bad to get over, and this car with no step, only the top step, was bad also to get over, and as a customary thing we put the car off to lighten the train at coal yard or the junction, my conductor said if there was no perishable freight in this house car he would drop it, for had the privilege to do that without telegraphing to Baltimore, if there was no perishable freight he would drop it at the coal yard; sometimes at the junction, and sometimes at the coal yard. We didn't get that far. I relied on that promise. The other brakeman Frank Cresswell was present at that conversation. I remained on the train.
22 I went into the caboose to warm myself and to eat. Whenever the train stops if we have time we could eat. We hardly ever get time on the trip unless it is on the single track. Sometimes on the single track meeting a passenger train we have 30 minutes; we have to go twenty minutes ahead of the passenger train, and then we have to wait ten minutes before we get started, and we can eat in a place of that kind, otherwise we eat just as we can; sometimes we go all the way through and get nothing. It was a bad cold night; snowing, and freezing and sleeting; it was very cold, I like to have froze after I got hurt. It was the 29th of February, 1876, somewhere between 4 and 5 o'clock; I had no watch. The train was stopping on the main track to take water at Coldfelters, sometimes we got there ahead of time, we would have 15 minutes; we have no specified time for stopping at that station. We can't leave there ahead of time. I don't know what the schedule of time was. We ran by schedule time. I don't know how many cars there were in that train; I didn't count them; but, from the general way of hauling freight I should say in the neighborhood of 20 or 25; about that. The crew
23 consisted of two brakeman, a flagman, and conductor. My position on the train was about 8 or 10 cars from the caboose—the rear end when the train was running. If the train was standing still I could go anywheres on it which I choose. I never got any orders against going to the caboose to warm myself. The men did it on that and every other road. Oftentimes the front brakeman went to the engine. He had not time to get to the rear end of

the train, and if it was bad weather he would go to the engine. The rear brakeman's place was the caboose if he wanted to warm himself. I always carried my lunch in the caboose. When a train stops it is expected of a brakeman to examine the running gear, and if there is any break, blocks down, or anything of that kind he can fix it and then go into the caboose. I walked over the tops of the cars from that position, because I might be left if I walked on the ground. The train leaves as soon as the bell rings and the whistle blows. The distance of my train was about 100 feet—no more than that. I had 8 or 10 cars—8-wheel cars, The reason I was
24 on top of the car was that the engineer can see the signal that all the train is coming; that is one reason you have to go up there to give a signal to the engineman that he can see the train is coming; trains in starting often lose a portion. He might run 8 or 10 miles without it. I have known one to run from Coldfelter's to York without it.

Q. In consideration of the stormy night did you exercise any precaution? What did you do?

A. I left my gloves in the caboose for one thing and never got them any more. I did that so as I could get on the train; to hold on better with my hands, knowing that I had bad cars to get over. I left my overcoat and green coat in the caboose and my gloves. The car from which this step was knocked off was a house car with 8 wheels. A loaded lumber car was immediately in front of it. This house car had an upright brake in the south of it and a hand brake in the other end of it—a double-connected brake. I fell over the south end. As a general thing the steps on such cars are about that far (indicating about two feet) apart. They ought to be in the centre of *of* the
25 end of the car, right opposite the running boards that the men walk on—right beneath the running board, straight down; most of them have 3 steps, some few of those old cars only have two steps; but as a general thing there are three steps. That one end of this car only had one step; if there had been three, two were off, and if there had been two, one was off. When there are two steps they are wider apart. If there, then, are three you wouldn't have as far to step as if there were only two. But some cars are considerably taller than others. There are no other attachments for the convenience of brakeman getting down or up except those steps. On the top of the car there is a hand-hold about that long (indicating) to take hold of. They are as often on one said of the steps as the other. If there is an upright brake the step might be on the opposite side. It depends upon which side the upright brake is; I don't know which side that usually is; more likely on the right side, facing the end of the car. In that case the hand-
26 hold would be on the left side. The direction of the track at that point is, I suppose, nearly north and south, as near as I can tell; I mean at Coldfelters. The natural way of going down over a car would be with my face to the end of the car, my lantern on my left hand, and take hold of the hand-hold with my left hand. I always threw my lantern over my left arm. In going down over

a car in that direction I would turn my face about northeast. I don't remember anything particular about the weather, except it was very cold and icy; it had been snowing and raining; whether it was raining after we left York I do not know; it was blowing; it was bitter cold—blowing strong.

Q. You don't know whether it was actually snow or ice or what it was?

A. The cars coming from the north often the snow may be a foot thick and freeze, and coming down off those steps the ice causes you to slip through the cars. At the time I lay there I know there was something falling; whether it was snow or rain I don't know. I laid there a few minutes until a couple of men came up.

27 This is the way the accident occurred: After leaving Coldfelters I walked out on the train as I usually did out of the caboose and over the train; getting down the 3d car from the caboose there was a step off, and in getting down this car, expecting to find a step to put my foot there, and not reaching any step, the result was I came down on the platform and from the platform down on the ground, and the wheels ain't more than about that far apart (incating about 2½ ft.) Before I could get out three cars and a caboose went over me—my right leg was all—it was off in a manner—all crushed up; the clothing kept it on. * * * Those steps are usually fastened on a box car with screws—about six screws—three on a side.

Q. Are you able to say, being a railroad man, that no car is in a fit and complete condition to run unless there are at least two steps on a car of that kind?

A. No, sir; they wouldn't send them out of the shop—cars just built, or any kind?

Q. No. Of any kind would a car with only one step be considered a good and finished car?

28 A. I don't believe the superintendent would allow it if he knew it. It has been done. I have seen them with only one brake, I have never seen one with only one step after it was finished. I saw the steps off at York Haven; it could not by any probability be detached, if it had not been loose, unless somebody would have knocked it off or unless they get into a wreck. It did not get into any wreck. The step couldn't have been on firmly at Marysville or it wouldn't have been off at York Haven. York Haven is about 20 miles from Marysville. I guess we had a smooth run down from Marysville.

Q. Do you know that the company ever kept inspectors at Marysville whose duty it is to inspect cars before putting them into trains?

A. Yes, sir; they have in all the yards. I don't know anything about their duties. I never read the book of rules. I have often seen them stooping down and looking at the running gears. I never seen them then get up on them and examine the running board; some cars might stand there a couple of days to make

29 up a train, and others wouldn't stand there over 20 minutes. I know the cars were not standing there in this train, because we were to make up an express train. We were to leave on the

28th, and instead of that we left on the 29th, waiting for cars; we had to lie over to get cars to make up the train. I don't know where these cars came from; I know the train came out of the yard at Marysville. That night they annulled the express freight and started us out on the coal freight. They use the yard at Marysville for shifting cars, having cars for the North, East, and West; they will take cars there from Baltimore over to the East, and the North and West go over the north branch of the Susquehanna from Pittsburgh. It is a junction—a switching place for all trains; they make up trains there to go to Baltimore, Elmira, and Pittsburgh. I don't know whom the yard belongs to; they call it the Marysville yard North and South. I always understood that it belonged to the Northern Central Railway Co.—the end that we worked. The Northern Central engines were in both yards and shifting; the inspectors at the south end were the Northern Central R. W. Company's and at the north end the Pennsylvania men. Our car came out of
30 the south end.

Q. Had you ever complained before to your superiors about the condition of your cars when they were bad?

A. I never went to the train-master; I would speak to my conductor. None of the brakemen ever go to the train-master; it is a very rare thing unless they see "a man violating the rules of the company—drunk, or something like that, and then they will report him."

And on being cross-examined he said:

I had been in railroad service since 1873. * * * My place on that train was 8 or 10 cars from the caboose, to brake to the caboose; my proper station when the train was in motion was about 8 or 9 cars from the caboose. I would brake to the caboose from my station. If the train wouldn't stop I would keep on until I had them all down; my duties related to that end of the train. When we left Marysville I was about 8 or 9 cars from the caboose, between two cars, where the brakes were—on the bumper; I remained there until the train reached Bridgeport; it stopped at Bridgeport. It is likely I got off there if it stopped any time. * * * When we left York I did not go over the cars from the caboose to my station; I was talking
31 to the conductor and brakeman while the fireman was taking water, and when the train started I stepped off the platform right up to where I need get onto my station; as the train was going to Coldfelters I either sat or stood on the car at my post until I got there; the train did not need over one brake there; it depends on how fast the train was going; when we stopped there I went to the caboose; I had my coat and gloves on then; there was a fire in the caboose; I ate my breakfast; I don't remember about warming my coffee; I took off my coat and my gloves and was eating my breakfast when the train started; just as soon as the train started I left to go back to my post. I was still eating my breakfast when the train gave the signal and started, and after it started I went up on the top of the cars without my overcoat and without my gloves; they were buckskin gloves, the usual kind worn. I did

not have my coat and gloves, because I stayed there eating my breakfast until the train was in motion and then went off in a hurry; there was more safety without them.

Q. As a matter of fact, do you say buckskin gloves are more or less safe than holding on with the bare hand?

32 A. The bare hand is the best. I had taken off my gloves for the purpose of eating my breakfast. It had not stopped snowing at Coldfelters; it had been snowing that night; there was snow and ice on the top of these cars and on the bumpers; on the south end of this car there was an upright brake and next it was a lumber car; some lumber cars are loaded with steps allowing the lumber to project out a foot—three steps; the boards will run out and reach over maybe to the end of the car, one end, so that it is a difficult matter to couple them and bad to climb up of course; the boards frequently project over the end of the car so as to lessen the distance between that car and the one next to it, but they don't lay them only about half as high as a house-car; they lay them up towards the house-car; on those upright brakes there is a board also, and stepping on that one could step down to the lumber car if the lumber was long and projected over, if not it could not be done; it would depend upon how it was loaded; if a man was coming from the top of a car it would not depend wholly how the lumber was loaded whether it would be easier for him to go down and climb up or whether

33 it would be easier to step on this board around the brake and step over, because as a general thing there is a cross-piece on top of the lumber, and there is very few of them but what a man can reach the top of this cross-piece—a piece on the side to hold the lumber of-; there would be difficulty in a man's coming along the top of a box-car, then stepping down upon the platform, then around an upright brake, and then stepping down on the lumber car; if the car ain't loaded for that purpose—not properly loaded for the steps; but it is very often so wide that you couldn't step it; it is often sufficiently narrow to step it also; it depends entirely upon how the lumber has been loaded—that is, how the lumber car is adjusted on the top; there was an upright brake on the south end of that car and a platform around it, the end next the lumber car; in getting down the side of a box car like that you don't take hold of the hand hold first in all cases. I have taken hold of the wheel of the upright brake, that is a sufficient hold also; each of these steps have a hand hold as part of the step, a place where you

34 hold on with your hand. I don't know the height of the platform. It seems to me it is taller than 6½ ft., because I never could see the top of any of them, when I was standing on the bumper and I was nearly six feet—5 ft. 7 or 8 in.—somewhere along there, I say the upper step was on. I put my right foot on that; my hands were on the car over the hand hold. I don't remember having hold of anything with the other hand; there was the wheel there which I said I sometimes took hold of, and there was the hand hold and the step. It was the upper step that was on the car there wasn't but one step missing, very likely it had but two,

but there was only one on; this step was nearer the top as if it ought to have three steps. I remember putting my right foot on the top step, and putting the other one where the other step ought to have been, and the result was I went down on the platform and down on the ground.

Mr. MacVeagh: When he stepped for the second step it was not there; in the projection of the first step is a hand hold; he didn't have hold of that. He had one foot on it. He says he was
35 doing nothing with his left hand that he knows of.

A. I did not. I said I had my lantern on my left hand and taking hold of the hand hold. I had my right foot on the step and was reaching for the second step, as I always did before, only not finding the step and coming down, missing the step.

The Court: You loosened your hold above?

A. Yes, sir; if I had just thought at that moment that the step was gone—I am strong enough to hold my weight with two fingers—right at that moment, getting down, if I had just thought that the step was gone, I could for that matter have come down on the brake-rod—slid down on that; I had climbed up and down before by taking hold of the brake-rod with one hand, not the wheel — the brake-rod; I could put my foot against the rod, and I could hold myself up and get hold of the running board that was there; that is the way I got up and down both times before—by the help of the brake-rod and holding on, knowing that this step was not there.

Redirect examination:

36 It is the customary thing to stay in the caboose until the train would make a start, and then as soon as the train started I went to my post; we get no notice of the starting of the train, only just blow a whistle and start right off; can't say how long it stops; we might go to a station ahead of time, and if there is anything an engineer has to do we might lay five minutes behind hand; this was a through train, most of it. * * * As a prudent man, I would not jump from the box car to the lumber car in bad weather; the majority of them climb up and down from one car to another; have heard some say they take off their boots. When the accident happened I was going to my place on the train; I had no other duty on the top of the cars, as the train was moving off, unless the engineer calls for a signal, and generally he does do that when the train is moving off; there is occasion for it in all places where the train starts or stops, only in cities we ain't allowed to blow them; we have a right to notice the train when it is running to see that it is all going; the train might start and go 100 y'ds and then break
37 loose. I don't know that I gave any signal at this particular time; can't remember how my mind was occupied, only going to my post; my mind was on that—going where I had a right to be.

38 And thereupon counsel for the plaintiff called Frank Creswell, who being duly sworn, testified as follows:

I know the plaintiff and defendant. I live in Baltimore. I was

in the employ of defendant from July, 1875, to July, 1877, as brakeman on a freight train, the last time I was brakeman on the train Kane was on, at the time of the accident. My position was front brakeman. I remember when we made up the train, getting the cars from two different parts of the Marysville yard to make up the train. I think there were about 12 cars, as near as I recollect, taken from the siding where they had just been backed off by a Pennsylvania engine on the Pennsylvania road, which runs parallel with the Northern Central at that place. We had taken those cars out of that siding and then run to the lower end of the yard—the south end—and taken out as many more as was required that we had to have. The cars that were taken off the siding which had just come
off the Pennsylvania R. R. were part of this train. They were
39 put in the rear end of the train, as near as I can recollect.
What little time we had I observed whether the running gear of some of the cars on the front part of the train was in order. We didn't have many minutes to stop after the train was coupled up. It was made up soon after the cars came in. I don't suppose it was over three minutes from the time the cars were put off until our engine backed up to the siding and took hold of those cars; and, as soon as possible, run to the lower end of the yard—the south end of the yard—to get the balance necessary. The reason the cars from the Pennsylvania were put in the rear was that it was customary in taking cars from any siding in that part of the yard when you would get, for instance, more than half your train there it was easier to drop them and cut the engine loose and back in from the south end and get what few more was necessary to make up the train than it was to handle the whole train and back in there to couple with one or two more. In this instance the cars that came
over the Pennsylvania Central were put in the rear of the train
40 There were car inspectors in the Marysville yard at that
time. Their duties are to inspect the cars to see that they are in running order. That is as near as I can explain it. I never studied their rules. We started from Marysville on time, as near as I can recollect, running to Bridgeport. That was the first place we stopped. I don't remember for what cause; whether we were ahead of time that night I can't say; I don't remember; then we went on, and I don't know the next place we stopped. I remember York Haven. I don't remember whether we took any siding between Bridgeport and York Haven or not to allow another train to pass us. I recollect stopping at York Haven, but can't say how long. I recollect distinctly Kane speaking to the conductor there. He stated to the conductor at York Haven that there was a car in his part of the train that had one step off and he considered it unsafe, and he asked the conductor, being as it was customary to put off cars at the
coal yard to lighten the train before going over the heavy
41 grade—he asked him if he would put this car off at the coal
yard instead of taking them from the front of the train, as was usually done when it was not perishable freight in front. The conductor made the remark that he would look over his manifests, and if it were possible and there was no perishable freight in this

car he would put it off if he had the chance at the coal yard. * * * The understanding was that it was to be put off at the junction, the coal yard. I didn't know anything about the accident at the time it occurred. We stopped at Coldfelter's to take water, and from there we ran to the coal yard, where the fast *time* was expected to pass on the same track, and we were to be out of the way of the fast line at the coal yard. When we got to the coal yard, the fireman having something to do, I was sent ahead with the flag in the fireman's place, being front brakeman. I new nothing of the accident until the express came along, and as they passed the baggage-master told me Kane was aboard of the express. I was then some distance south of the coal yard for the purpose of
42 flagging a train that might be coming north. It was a fearful cold night, raining and sleeting. The train was covered with ice and snow; that I remember very well. It was most bitter cold; the rain was freezing as it fell—a regular winter's storm. I don't recollect which way the wind was blowing. I would call the direction of the track at Coldfelter's, right at the station, north and south. The natural way of getting down over a box car of the character of this from which Kane fell would be—of course, in the first place, I would take hold of the hand-hold fastened on the top, at the end of the left of the car, and then step on the steps; that is the way down. As I was going down, after I left go with my hand, I would catch the other step I had left. It is according to which side of the running board or step, you might say, the iron was placed on which hand I would take hold of the holding-on iron with. In cars that have an upright brake it is usually on the right side of the centre of the car, I think, as you stand facing the end of the car; I have seen it on the right-hand side, too, and again on
43 the left. If the holding-on iron was on the left-hand side I would naturally take hold with the left hand. In a case of that kind you usually carry your lantern on the left arm.

Q. Would it be a safe and prudent way, in a time like that, to cross from a box car to a lumber car, to make a jump or step where the boards are projected for that purpose on the lumber car? Suppose the lumber car were piled up with a load projecting so as to reach towards the box car, would you consider it safe to spring or jump from one car to the other?

A. No, sir; it would not be safe; as a prudent man, I wouldn't take that way to do it. The proper way would be to climb down and then up.

And upon being cross-examined, he said:

There is a board around the projection of the upright brake which extends out some 4 to 7 inches in width. The coal yard and Hanover Junction are substantially the same place. We laid over there about 30 minutes; supposed to arrive there 20 minutes be-
44 fore—I think I am mistaken—10 minutes before, and lay there 10 minutes after; I have forgotten."

And thereupon the plaintiff rested, and counsel for defendant

moved for a nonsuit, and the court declined to enter the same; and thereupon counsel for defendant requested the court to charge the jury to find a verdict for the defendant; and the court thereupon charged the jury as follows:

He will not grant a nonsuit in this case, in view of the doubt which there seems to be upon this subject of the power of the court to direct nonsuit. I confess I never saw any occasion for it in Pennsylvania. The same result, however, is accomplished where the court thinks a party is entitled to a nonsuit by directing the jury to find for the defendants. With the question sprung upon the court suddenly, as this question has been, we are impressed with the belief (and such a belief as we
45 think it safe to act upon at this time) that the plaintiff has not made out a case. We will be willing and glad to hear counsel more fully upon this subject upon a motion for a new trial, and can then look at the question with deliberation and with better hope of avoiding mistake, but, I repeat, at present we are so impressed with the belief that the plaintiff has not made out a case that we could submit to the jury, and upon which we could allow them to find a verdict for the plaintiff, that we feel it to be our duty to say to the jury now that they must find for the defendant. If it be conceded, as probably it should be, may be, at all events, at present, that the defendant was guilty of negligence, the jury cannot find for the plaintiff while it appears clearly and distinctly from the plaintiff's testimony that he was guilty of contributory negligence. It is upon this branch of the case that the judgment of the court is against the plaintiff. The plaintiff discovered this defect in the car—
46 that is, the absence of the step. His mind was very much impressed with it. He traveled over the car once, if not twice, after having discovered it, both ways. He called the attention of the conductor to the subject. He was aware of the danger—aware that while he could get back and forth over the car without serious difficulty it was important that the step should be there. Aware of the absence of the step, he notwithstanding sought to use it as if present. He did so because he failed to remember what he very well knew and what had been deeply impressed upon his mind within a few minutes. While he knew the great occasion there was upon that night to observe extraordinary care, for only one moment before, when he left the caboose, he omitted to take his gloves and his overcoat, because of this danger. Notwithstanding he sought to use this step, and let go his hold above, depending upon it, while he knew it was not there. He did so through forgetfulness, but that does not
47 excuse him. He had no other special subject on his mind than his own safety at the time. He was going from the caboose back to the station; that was his only duty. There was nothing to embarrass him; nothing to distract his attention. Why he forgot it is difficult to understand. Of course, he did forget; that is plain, but it affords him no excuse. It was negligence, in the judgment of the court—plain, distinct negligence, and that it contributed to the result is clear. The witness himself says that but for this there would have been no difficulty. He could get up and

down. He would have held on above and worked himself down at the side of the car. There was no trouble about it, and he forgot, and the consequence was that he fell under the car and met with a very great misfortune.

Under the circumstances, gentlemen, there is nothing left for the court (much as we may all sympathize with this poor fellow)
48 but to say to you that he has failed to make out a case entitling him to charge the defendant with the consequences of his misfortune.

49 And thereupon the counsel for the said plaintiff did then and there except to all of the aforesaid charge and opinion of the said court; and, inasmuch as the said charge and opinion so excepted to do not appear upon the record, the said counsel for the said plaintiff did then and there tender this bill of exceptions to the opinion of the said court and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge, at the request of the said counsel for the plaintiff, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 16th day of June, A. D. 1882.

WM. BUTLER. [L. S.]

50 Endorsed: No. 86. C. C. U. S. Oct. sess., 1880. Kane *vs.* Northern Central R. W. Co. Bill of exceptions. Filed June 20, 1882.

51 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit. Oct. Sess., 1880.

EDWARD KANE, a Citizen of the State of Maryland,
vs.
THE NORTHERN CENTRAL RAILWAY COMPANY, a Corporation duly Incorporated and Existing under the Laws of the State of Pennsylvania. } No. 86.

Know all men by these presents that we, Edward Kane, John Rodgers, and Robert A. Wilkinson, are held and firmly bound unto the Northern Central Railway Company in the full and just sum of five hundred dollars, to be paid to the said The Northern Central Railway Company, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this second day of July, A. D. 1884.

Whereas lately at a term of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a suit depending in said court between the said Edward Kane, a citizen of the State of Maryland, and The Northern Central Railway Company, a corporation duly incorporated and existing under the laws of the State of Pennsylvania, judgment was rendered against

the said plaintiff, and the said plaintiff having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation
52 directed to the said The Northern Central Railway Company citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next ensuing:

Now, the condition of the above obligation is such that if the said Edward Kane shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

EDWARD KANE. [L. S.]
JOHN RODGERS. [L. S.]
ROB'T A. WILKINSON. [L. S.]

Sealed and delivered in presence of—
NICHOLAS R. DORSEY, *J. P.*,
As to Edward Kane.
W. VON A. WILLIAMSON,
SAMUEL BELL,
Sureties.

Approved:
WM. BUTLER, *Judge.*

[Endorsed:] No. 86. October sess., 1880. Circuit court United States. Kane *vs.* The Northern Central Railway Co. Bond surwrit of error. Filed July 8, 1884.

53 UNITED STATES OF AMERICA, } *sct:*
Eastern District of Pennsylvania, }

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of Edward Kane, plaintiff, and The Northern Central Railway Company, defendant, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this twenty-sixth day of July, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of these United States the one hundred and ninth.

[Seal U. S. Circuit Court, E. D. Pennsylvania.]

SAMUEL BELL,
Clerk of C. C.

Endorsed on cover: E. Pennsylvania C. C. U. S. No. 84. Edward Kane, plaintiff in error, *vs.* The Northern Central Railway Company. Filed October 10, 1884.

NOV 28 1887

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887. No. 84.

EDWARD KANE,

Plaintiff in Error,

vs.

THE NORTHERN CENTRAL RAILWAY COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

JAMES H. GABLE,

Counsel for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887. No. 84.

EDWARD KANE,

Plaintiff in Error,

vs.

THE NORTHERN CENTRAL RAILWAY COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

☞ We had prepared a Brief, and filed it for the Plaintiff in Error; and in doing so, followed the ordinary practice in our Court of Appeals, in the State of Maryland. Upon examining the 21st Rule of this Court however, we discovered at once what we had failed to comply with its full and specific requirements in the *manner* of presenting the case. We have therefore somewhat hurriedly changed the *structure* of our Brief, and filing it anew, ask that the first may be withdrawn. Since the preparation of the first Brief also, the Defendant has asked what, in a spirit of mutual accommodation was promptly and cheerfully granted, *some modification* of the *printed* Record in this case, by the addition of certain of the Stenographic notes, which appear at end of Defendant's paper-book; this would have occasioned the addition of a leaf or more to the original Brief. We have, therefore, under all the circumstances, thought it best to write the Brief anew.

Abstract of Case.

This was an action of trespass on the case, brought by plaintiff in error, a citizen of the State of Maryland, against the defendant, a citizen of the State of Pennsylvania, Record, 7, folio 18, the same being an action brought to recover damages for personal injuries sustained by plaintiff while in the employ of the defendant. Record, 3, 4 and 5, folios 6-11.

Issue was joined, Record, 5, folio 13, and jury impannelled to try the same. Record, 5, folio 14. Upon the request of the defendant, after plaintiff's case was in, the Court charged the jury to find for the defendant, the charge being based upon the ground that plaintiff had not made out a case, and upon the further ground specifically, of contributory negligence of the plaintiff. Record, 16 and 17, folios 44-49.

Judgment on the verdict was afterwards entered for the defendant. Record, 6, folio 17.

The plaintiff excepted to this charge, and prayed the Court to sign and seal his bill of exceptions, which has been done; Record, 17, folio 49; and thereupon he sued out his writ of error on appeal to this Court. Record, 1, folio 1.

Assignment of Errors.

First Error—For specification of errors relied on and urged, plaintiff in error assigns for the first error, so much of Court's charge as is comprised in the words following, to wit: "at present we are so impressed with the belief that the plaintiff has not made out a case, that we could submit to the jury, and upon which we could allow them to find a verdict for the plaintiff, that we feel it to be our duty to say to the jury now that they must find for the defendant." Record, 16, folio 45.

Second Error—And for the second error, plaintiff assigns so much of the Court's charge as is comprised in the words following, to wit: "If it be conceded, as probably it should be, may be, at all events, at present, that the defendant was guilty of negligence, the jury cannot find for the plaintiff while it

appears clearly and distinctly from the plaintiff's testimony that he was guilty of contributory negligence." Record, 16, folio 45.

Third Error—And for the third error, plaintiff assigns so much of the Court's charge as is comprised in the words following, to wit: "The plaintiff discovered this defect in the car—that is, the absence of the step. His mind was very much impressed with it. He traveled over the car once if not twice, after having discovered it, both ways. He called the attention of the conductor to the subject. He was aware of the danger—aware that while he could get back and forth over the car without serious difficulty it was important that the step shonld be there. Aware of the absence of the step, he notwithstanding sought to use it as if present. He did so because he failed to remember what he very well knew and what had been deeply impressed upon his mind within a few minutes." Record, 16, folio 46.

Fourth Error—And for the fourth error plaintiff assigns so much of the Court's charge as is comprised in the words following, to wit: "While he knew the great occasion there was upon that night to observe extraordinary care, for only one moment before, when he left the caboose, he omitted to take his gloves and his overcoat, because of this danger. Notwithstanding he sought to use this step, and let go his hold above, depending upon it, while he knew it was not there. He did so through forgetfulness, but that does not excuse him." Record, 16, folio 46.

Fifth Error—And for the fifth error, the plaintiff assigns so much of the Court's charge as is contained in the words following, to wit: "He had no other special subject on his mind than his own safety at the time. He was going from the caboose back to the station; that was his only duty. There was nothing to embarrass him; nothing to distract his attention. Why he forgot it is difficult to understand. Of course, he did forget; that is plain, but it affords him no excuse. It was negligence, in the judgment of the Court—plain, distinct negligence, and that it contributed to the result is clear." Record, 16, folio 47.

Abstract of Case.

This was an action of trespass on the case, brought by plaintiff in error, a citizen of the State of Maryland, against the defendant, a citizen of the State of Pennsylvania, Record, 7, folio 18, the same being an action brought to recover damages for personal injuries sustained by plaintiff while in the employ of the defendant. Record, 3, 4 and 5, folios 6-11.

Issue was joined, Record, 5, folio 13, and jury impannelled to try the same. Record, 5, folio 14. Upon the request of the defendant, after plaintiff's case was in, the Court charged the jury to find for the defendant, the charge being based upon the ground that plaintiff had not made out a case, and upon the further ground specifically, of contributory negligence of the plaintiff. Record, 16 and 17, folios 44-49.

Judgment on the verdict was afterwards entered for the defendant. Record, 6, folio 17.

The plaintiff excepted to this charge, and prayed the Court to sign and seal his bill of exceptions, which has been done; Record, 17, folio 49; and thereupon he sued out his writ of error on appeal to this Court. Record, 1, folio 1.

Assignment of Errors.

First Error—For specification of errors relied on and urged, plaintiff in error assigns for the first error, so much of Court's charge as is comprised in the words following, to wit: "at present we are so impressed with the belief that the plaintiff has not made out a case, that we could submit to the jury, and upon which we could allow them to find a verdict for the plaintiff, that we feel it to be our duty to say to the jury now that they must find for the defendant." Record, 16, folio 45.

Second Error—And for the second error, plaintiff assigns so much of the Court's charge as is comprised in the words following, to wit: "If it be conceded, as probably it should be, may be, at all events, at present, that the defendant was guilty of negligence, the jury cannot find for the plaintiff while it

appears clearly and distinctly from the plaintiff's testimony that he was guilty of contributory negligence." Record, 16, folio 45.

Third Error—And for the third error, plaintiff assigns so much of the Court's charge as is comprised in the words following, to wit: "The plaintiff discovered this defect in the car—that is, the absence of the step. His mind was very much impressed with it. He traveled over the car once if not twice, after having discovered it, both ways. He called the attention of the conductor to the subject. He was aware of the danger—aware that while he could get back and forth over the car without serious difficulty it was important that the step shonld be there. Aware of the absence of the step, he notwithstanding sought to use it as if present. He did so because he failed to remember what he very well knew and what had been deeply impressed upon his mind within a few minutes." Record, 16, folio 46.

Fourth Error—And for the fourth error plaintiff assigns so much of the Court's charge as is comprised in the words following, to wit: "While he knew the great occasion there was upon that night to observe extraordinary care, for only one moment before, when he left the caboose, he omitted to take his gloves and his overcoat, because of this danger. Notwithstanding he sought to use this step, and let go his hold above, depending upon it, while he knew it was not there. He did so through forgetfulness, but that does not excuse him." Record, 16, folio 46.

Fifth Error—And for the fifth error, the plaintiff assigns so much of the Court's charge as is contained in the words following, to wit: "He had no other special subject on his mind than his own safety at the time. He was going from the caboose back to the station; that was his only duty. There was nothing to embarrass him; nothing to distract his attention. Why he forgot it is difficult to understand. Of course, he did forget; that is plain, but it affords him no excuse. It was negligence, in the judgment of the Court—plain, distinct negligence, and that it contributed to the result is clear." Record, 16, folio 47.

Sixth Error—And for the sixth error, the plaintiff assigns so much of the Court's charge as is contained in the words following, to wit: "The witness himself says that but for this there would have been no difficulty. He could get up and down. He would have held on above and worked himself down at the side of the car. There was no trouble about, and he forgot, and the consequence was that he fell under the car and met with a very great misfortune." Record, 16 and 17, folio 47.

Seventh Error—And for the seventh error, plaintiff assigns so much of the Court's charge as is comprised in the words following, to wit: "Under the circumstances, gentlemen, there is nothing left for the Court (much as we may all sympathize with this poor fellow) but to say to you that he has failed to make out a case entitling him to charge the defendant with the consequences of his misfortune." Record, 17, folio 48.

Eighth Error—And for the eighth error, plaintiff assigns the whole of the charge delivered by the Honorable Court below, and which is embraced in the words following, to wit: "He will not grant a nonsuit in this case, in view of the doubt which there seems to be upon this subject of the power of the Court to direct nonsuit. I confess I never saw any occasion for it in Pennsylvania. The same result, however, is accomplished where the Court thinks a party is entitled to a nonsuit by directing the jury to find for the defendants. With the question sprung upon the Court suddenly, as this question has been, we are impressed with the belief (and such a belief as we think it safe to act upon at this time) that the plaintiff has not made out a case. We will be willing and glad to hear counsel more fully upon this subject upon a motion for a new trial, and can then look at the question with deliberation and with better hope of avoiding mistake, but, I repeat, at present we are so impressed with the belief that the plaintiff has not made out a case that we could submit to the jury, and upon which we could allow them to find a verdict for the plaintiff, that we feel it to be our duty to say to the jury now that they must find for the defendant. If it be conceded, as probably it should be, may be, at all events, at

present, that the defendant was guilty of negligence, the jury cannot find for the plaintiff while it appears clearly and distinctly from the plaintiff's testimony that he was guilty of contributory negligence. It is upon this branch of the case that the judgment of the Court is against the plaintiff. The plaintiff discovered this defect in the car—that is, the absence of the step. His mind was very much impressed with it. He traveled over the car once, if not twice, after having discovered it, both ways. He called the attention of the conductor to the subject. He was aware of the danger—aware that while he could get back and forth over the car without serious difficulty it was important that the step should be there. Aware of the absence of the step, he, notwithstanding, sought to use it as if present. He did so because he failed to remember what he very well knew and what had been deeply impressed upon his mind within a few minutes. While he knew the great occasion there was upon that night to observe extraordinary care, for only one moment before, when he left the caboose, he omitted to take his gloves and overcoat, because of this danger. Notwithstanding he sought to use this step, and let go his hold above, depending upon it, while he knew it was not there. He did so through forgetfulness, but that does not excuse him. He had no other special subject on his mind than his own safety at the time. He was going from the caboose back to the station; that was his only duty. There was nothing to embarrass him; nothing to distract his attention. Why he forgot it, is difficult to understand. Of course, he did forget; that is plain, but it affords him no excuse. It was negligence; in the judgment of the Court, plain, distinct negligence, and that it contributed to the result is clear. The witness himself says that but for this there would have been no difficulty. He could get up and down. He would have held on above and worked himself down at the side of the car. There was no trouble about it, and he forgot, and the consequence was that he fell under the car and met with a very great misfortune. Under the circumstances, gentlemen, there is nothing left for the Court (much as we may all sympathize with this poor fellow) but to say to you that he has failed to make out a case entitling him to

charge the defendant with the consequences of his misfortune." Record, 16 and 17, folios 45, 46, 47 and48.

Ninth Error—And plaintiff assigns for the ninth error, that the Court erred in instructing the jury to find a verdict for the defendant, when the evidence given at the trial, with such inferences as the jury could justifiably draw from it, was sufficient to support a verdict for the plaintiff.

Tenth Error—And plaintiff assigns for the tenth error, that the Court erred in instructing the jury to find a verdict for the defendant, when negligence of the plaintiff was not the only and necessary inference to be drawn from all the facts and circumstances disclosed by the evidence offered in this case:—the evidence otherwise in the case being sufficient to support a verdict for the plaintiff, should the jury have found that plaintiff had not been guilty of contributory negligence.

Brief of the Argument.

Defendant's Negligence.

Plaintiff was employed as a brakeman upon defendant's railway, between Marysville Yard and the city of Baltimore, the distance between the two places being ninety-one miles. Record, 7, 8 and 11, folios 19, 20 and 29. And was so engaged on the night of the 29th February, A. D. 1876, helping conduct a freight train of cars south from Marysville to Baltimore. Record, 7, folio 19.

This train was made up at the Marysville Yard on the night of the 29th February, A. D. 1876. Record, 11, folio 29. The defendant had inspectors of cars at their yard at Marysville, whose duties, it seems, were to examine the running gear of the cars, and see that the cars were in running order. Record, 10, folio 28; Record, 14, folio 40.

The duties of inspectors were in this case rendered useless, and suspended practically by the orders of the dispatcher, in the hasty throwing together of the train. Record, 8, folio 20; Record, 10 and 11, folio 29; Record, 14, folio 39.

In the rear end of this train was a house or box car, the *third* from the caboose, with the step off the south end, or end of the car toward the engine, and which must have been off at Marysville, or so loosely on as to be even more dangerous than if it were off; the fourth car from the caboose, or the one immediately in front of this car, was a loaded lumber car. Record, 9, folio 24; Record, 10, folios 27 and 28. See end of Appendix to defendant's brief.

There seems to have been *several cars* in this train in *bad condition.* Record, 8 and 9, folios 21 and 24. And this particular car with the step off, *was one of a few very old cars;* or if that were not so, and if it were a car of more recent construction, then *two steps were off.* Record, 9, folio 25.

1. Plaintiff, in entering the service of this defendant corporation, took the risk of dangers ordinarily incident to the ser-

vice only, the obligation of the master being *to furnish, provide and maintain sufficient, safe, adequate and suitable machinery and cars* for the use of plaintiff; that the *furnishing* and the putting into its train a car, the character of which involved peril of life and limb to plaintiff, was an act of gross negligence on the part of the defendant, cannot, under the law applicable to such a state of facts, be well disputed.

Mullen vs. Steamship Co., 28 P. R. Smith, 32.
Snow vs. Housatonic R. R. Co., 8 Allen, 446.
Hough vs. Texas Pacific R. R. Co., 100 U. S. 213.
Gilman vs. Eastern R. R. Co., 13 Allen, 440.
Northern Pacific R. R. Co. vs. Herbert, 116 U. S. 642.

2. And the negligence is every whit the same, whether it be that of the master himself or that of certain of his employees, charged with the duty of furnishing and supplying safe and suitable machinery and appliances.

Corporations can act only by and through their agents and representatives, and the negligence of the car inspectors at Marysville in allowing such a car to be put into the train was the negligence of the defendant corporation.

Northern Pacific R. R. Co. vs. Herbert, *supra.*
Brann vs. Chicago, Rock Island and Pacific R. R. Co., 53 Iowa, 595.

3. The duty of inspection and repairing is one that is to be continuously performed and positively fulfilled. And the corporation is equally chargeable, whether the negligence was in originally failing to provide or afterwards failing to keep its machinery and cars in a safe condition and repair.

Brann vs. Chicago, Rock Island and Pacific R. R. Co., *supra.*
Hough vs. Texas Pacific R. R. Co., *supra.*
Ford vs. Railway Co., 110 Mass. 241.
Wharton on Negligence, section 211.

4. If the duties of these inspectors were limited in their scope, and did not fully cover that of cars with such defects as these; or, if as seems to have been the case, under a *higher authority*, the duty of inspection was in this instance altogether dispensed with, then the fault and negligence of the defendant company is greatly aggravated. As said by this Court, where a somewhat similar state of facts existed: "Its negligence in that case would have been in the highest degree culpable." And again, in the same case, it is said: "If, however, one [i. e., an inspector] was appointed by it charged with that duty, and the injuries resulted from his negligence in its performance, the company is liable."

Northern Pacific R. R. Co. vs. Herbert, *supra.*

5. It may seem superfluous to argue in this Court after the citation of *Herbert's case, 116 U. S. supra*, that car inspectors or dispatchers, or whoever they may be who order the making up of the trains and inspect them, are not *fellow-servants*, in a legal sense, with the brakeman, who helps conduct the train to its destination *after* it has been duly *furnished by them, the representatives of the master.*

The duties of the dispatchers or inspectors relate to the *furnishing* of safe and suitable machinery and cars; the duties of the brakemen and others to the *use of it.*

In the one instance the acts of those charged with the duty of furnishing machinery and cars are the acts of the master himself; in the other instance in the *use of the cars* when furnished, saving and excepting the conductor, the whole crew of trainmen are fellow-servants, having one common purpose and one common end to attain, under one common employment, *in the use of the thing*, the safe conduct of the train to its destination. The conductor, however, in such case is the representative of the master, *being clothed with the general authority of the master as to the running of the particular train*, and, therefore, not within the rule relating to the negligence of fellow-servants.

Chicago, Milwaukee and St. Paul R. R. Co. vs. Ross, 112 U. S. 377.

Shanny vs. Androscoggin Mills, 66 Me. 420.

Promise of the Conductor.

At York Haven, in going over the cars, the plaintiff discovered that the step was off the particular car mentioned. Record, 8, folio 21. He complained, it seems, at once, and afterwards at York, to his conductor, about the condition of the cars, and this one in particular, and was promised that this car with step off should be put off and out of the train at the junction or coal yard. Record, 8, folio 21; Record, 14 and 15, folio 41.

It was customary for plaintiff to complain in such matters to his conductor; Record, 11, folio 30; and in this instance he relied upon the promise made by the conductor. Record, 8, folio 21.

1. Where the servant is induced to continue in the service by promises of superior officers that defective machinery, or, as in this case, defective and dangerous cars, shall be removed, the servant assumes no additional risk, and if injured thereby the master is liable.

Clark vs. Holmes, 7 Hurlstone & Norman, 942–3.
Lanning vs. New York Central R. R. Co., 49 N. Y. 533.
Patterson vs. Pittsburgh and Connellsville R. R. Co., 26 P. F. Smith, 393.
Snow vs. Housatonic R. R. Co., *supra.*
District of Columbia vs. McElligott, 117 U. S. 621.

2. The primary duty of the servant is obedience to orders of his superiors; and he by no means occupies an equal plane with the master in respect to his continuing or not continuing in the service; and it is a question for the jury whether he voluntarily assumes the risk of the service, even when he remains *without a promise* to repair or remove defective machinery or incompetent servants.

Patterson vs. Pittsburgh and Connellsville R. R., Co., *supra.*
Lanning vs. New York Central R. R. Co., *supra.*
Railroad Co. vs. Keary, 3 Ohio St. 201.

Was the plaintiff guilty of contributory negligence?

I.

1. Plaintiff's *post or station* on the train was eight or nine cars forward from the caboose; his duties related to that section of the train, and as occasion required, he applied the brakes from his station on the train *back* to the caboose, and otherwise had charge of that end of the train. Record, 11, folio 30; Record, 13, folio 36. And this was the position occupied by plaintiff on the night of the accident, when the train left Marysville, and he stayed there at least until the train reached Bridgeport. *Ibid.*

2. The train was running on freight schedule time, but it nowhere appears that trainmen were furnished with schedules, and plaintiff did not have a watch. Record, 8, folio 22.

In the run from Marysville southward, the first stop made seems to have been Bridgeport; the *second*, York Haven, 20 miles from Marysville; the *third*, York, and the *fourth*, Coldfelters, the place of the accident. Record, 11, folios 30 and 31; Record, 7, folio 19.

3. Before the stop at Coldfelters, as it will appear from a close reading of the evidence, the plaintiff had gone over these cars *twice, in a northerly direction*, going from this position in the train toward the caboose, as he was accustomed to do in putting down the brakes of the train; the first time going over them was when coming into York Haven, where the step was discovered off; Record, 8, folio 21; and the second time at the next stop, when coming into York. Record, 7, folio 19. The next stop was Coldfelters, and coming into that place, no braking is needed, it being up grade going south. Record, 7, folio 19.

4. At York, plaintiff took his position by stepping right up into it off the platform, and kept it until the train got to Coldfelters. The plaintiff had not therefore gone *down* over the *south end* of the car, where the step was off, unless, which is barely possible, when the train was leaving York Haven.

5. He had climbed *up* over the *south* end of the car wanting the step, *twice*, as we have just seen; but there is no evidence that he had climbed *down* over the *south* end of that car before the accident. Plaintiff speaks of having "got up and down both times before," and of having "climbed up and down before," Record, 13, folio 35, "*both times*" evidently referring to his having gone over the cars *twice*, as has been seen, in braking the train; and the reasonable finding of the jury here would be that witness here speaks of the two ends of the two cars next each other; that is, *down* the end of one, and *up* the end of the next; down over the *north* end of the *lumber* car, immediately in front, and *up* the *south* end of the car with no step on.

Plaintiff says: "When we left York I did not go over the cars from the caboose to my station." Record, 11, folio 31.

6. To rebut this state of facts, apparent as we contend in the Record originally printed, the defendant has introduced at the end of his paper-book a section of the testimony in the case as it appears in the stenographic notes, and which it is agreed shall be read as part of the printed Record.

7. That portion of this supplement to the Record which we think may be the only part important, is comprised in the following questions and answers on cross-examination of plaintiff:

Q. Did you go back over your train at York Haven to the caboose?

A. Yes sir.

Q. Then you got down off of this car at the south end, and on the lumber car and over it and down over the two other cars?

A. I didn't have to climb down all of them. I jumped from one to the other.

Q. You did pass, as a matter of fact, clear from your station back to the caboose at York Haven, and got down into the caboose?

A. Yes sir.

Q. When you left York Haven, after taking water, you went back over the same train to your station?

A. Yes, sir.

Q. After leaving York Haven you went back from the caboose, over 8 or 9 cars, to your station?

A. Yes, sir.

8. That the plaintiff did *pass over the car* with the step off, at least once in the same direction he was going when the accident happened, may, under this testimony, be for the present conceded; that, however, in doing so it affirmatively appears that he *climbed down* over the *south end* of this car where the step was off we very confidently deny; and it is just one of the facts among others involved in the case, which we insist cannot be affirmed one way or the other until the *jury shall have passed upon it.*

9. So far indeed from showing that the plaintiff had as a matter of fact *climbed down* over the car with the step off, is this testimony, that it may be almost affirmed the other way, *that he did not.* When, in the second question quoted, he was interrogated about *this very car, specifically,* and about *getting down specifically,* his answer was "I did not have to climb down all of them. *I jumped from one to the other.*"

10. That the plaintiff had not at any time before the accident gone *down* over that end of the car where the step was missing, is of course very important, as plaintiff in that case would not have the benefit of previous experiment, so as to have the natural advantage of placing his hands and feet *next* time in the right place, somewhat *instinctively* or *mechanically.*

11. This is evidenced by mention made of it in the charge, where the Honorable Court has assumed it to be a fact in the case that the plaintiff had made the descent of the particular car over the end, with the step off, not *once* but *twice*; what was the particular fact was for the jury to find; and this section of the Court's charge, therefore, constitutes Plaintiff's Third Assignment of Error.

II.

12. It is usual and customary for brakemen on rear end of the train to go into the *caboose* when the train stops, to warm themselves and to eat; plaintiff always carried his lunch in the caboose. Record, 8 and 9, folio 23.

13. The only notice the trainmen have of the starting of the train is the blowing of the whistle by the engineer, and thereupon the train starts instantly. Record, 9, folio 23; Record, 13 folio, 36.

14. A heavy winter's storm was blowing at the time of the accident, the rain freezing as it fell, and ice and snow driving through and before a terrible gale. Record, 15, folio 42; Record, 10, folio 26. It had been snowing that night. Record 12, folio 32.

15. As he had a well-recognized right to do, and in consideration of the cold and severity of the storm it was necessary for him to do, plaintiff, upon the train stopping at Coldfelters, went to the caboose to warm himself and eat his breakfast. There was a fire in the caboose. Record, 7, folio 19; Record, 8, folios 22 and 23; Record, 11, folio 31.

III.

16. Plaintiff was eating his breakfast in caboose at Coldfelters when whistle blew and train started. Record, 11, folio 31.

17. In going to his station on the train, plaintiff was obliged to go over the top of the cars, for two reasons: One, that otherwise he might have been left; and the other and more important one, that he might signal to the engineer from the top of the cars that the train was all intact and unbroken. Record, 9, folios 23 and 24.

18. As a precautionary measure, plaintiff left his overcoat and gloves in caboose to better insure his safety in going over the cars. Record, 11, folio 31. See appendix and agreement of counsel at end of this brief.

19. In going *down* over the *south* end of the *third* car from the caboose, the car with the step off that end, and in the *natural* way of getting down, first grasping the hand-hold on the top of the car with his *left hand*, his lantern over the left arm, and next placing his right foot on the *top* step, the plaintiff reached with his left foot for the *second step*, which was not there; missing the step, the natural shock or *pull of* the body at once wrenched his hand from the hold above, or caused him to let go his hold; and letting go his hold, plaintiff fell first to the bumper or platform of the car, and that being covered with ice and snow, he slipped off and down between the couplings of the cars, and was run over by three cars and the caboose, sustaining such personal injuries as resulted in the loss of both of plaintiff's legs. Record, 7, folio 20; Record, 9, folio 24; Record, 10, folio 27; Record, 12 and 13, folios 34 and 35.

20. In going *down over* this car, plaintiff's face would be about *northeast*, and facing the winter's storm, ordinarily from that direction, of driving sleet and ice. Record, 10, folio 26.

21. The plaintiff, so far as his own acts were concerned, did not *deliberately* nor *negligently place himself in the way of danger;* he was in the line of his duty, *his mind preoccupied with that*, and he does not know but there may have been, and *generally was, a call from the engineer for a signal*; and this call for a signal as liable to come at one moment as at another, and possibly just when plaintiff was in the *act of climbing down*, it is to be noted.

22. His misfortune was brought about by what was entirely beyond his control, to wit: *momentary forgetfulness; flight of wits* on the instant; sudden *lapse of thought*. He says: "If I had just thought at that moment that the step was gone," &c.; "right at *that moment, getting down*, if I had just thought that the step was gone," &c. Record, 13, folios 35, 36 and 37.

IV.

23. Plaintiff exercised not only reasonable care, *but very great precaution*, in leaving his overcoat and gloves in the caboose. Record, 9, folio 24.

He had not only a right to be in caboose, but as a matter of humanity it was both necessary for both warmth and food,

that he might be able to perform his duties; and had he allowed himself to become *numb and cold* from exposure, not going there, he would in that very way have been wanting in his attention to his own personal safety.

That the men may thus in some manner care for and protect themselves, *is one of the purposes of the caboose.*

Plaintiff's mind, in going from the caboose to his station on the train, was occupied with his duty. Record, 13, folio 37.

Engineer generally *called for a signal* when train was moving off. Record, 13, folio 36.

Car with step off was *only third* one from the caboose. Record, 10, folio 27.

Plaintiff was *descending south end* of this car when he fell. Record, 9, folio 24.

Suppose, when just in the *act* of making the descent, or even when reaching for the missing step, the whistle of the engineer had *shrieked out for a signal* from plaintiff, might not his mind have been so *momentarily disturbed* and abstracted as easily to explain his forgetting on the instant?

When turned to make the descent over the end of the car, plaintiff's face was about northeast, and facing a wild, and for him, a tragic storm. Record, 10, folio 26.

Suppose, again, a small pellet of ice, of which an innumerable quantity was driving before the wind, had struck plaintiff in the eyes, on the nose or ears, or some portion of the face where more than ordinarily sensitive, naturally the *pricking* or *stinging* sensation thus produced might for the instant call off the mind from the step, and that instant might have been the *fatal moment.*

Or again, just at that critical juncture, the wind that was blowing may have for the moment interfered with or threatened to interfere with the lantern that plaintiff was carrying; or even so commonplace a thing as the wind disturbing the *hat* on plaintiff's head might have occurred; these are trifling

incidents, yet sufficient nevertheless, to afford an explanation of how the plaintiff may have, *for the moment*, forgotten the step, for it is to be noted that it was all the work of a moment.

24. Plaintiff says brake-rod was there, not the wheel on top, *but the rod*, which, "had he just thought right at that moment," he could have taken hold of; this rod was, as shown in the testimony, to right of plaintiff, on *opposite* side from *hand-hold* above. Printed Record, 9, *bottom*, and 13, *middle.*

But this catching at the brake-rod was also the work of a second; had plaintiff "just thought at that moment," he could, *on the instant, have thrown out his right hand* and grasped this rod; or had he, possibly when on top of the car, and *just* as he made the first step of the descent, "*have thought*," he might have, at that moment, grasped the brake-rod and have "slid down that."

V.

25. But it is respectfully submitted that *lapse of memory, absent mindedness, abstraction, or flight of wits* momentarily, is not in itself either culpability or negligence.

In legal phrase, plaintiff, to preclude recovery, must be "*guilty* of contributory negligence."

In the whole range of the law and of the cases, can it be found that the law has fastened *culpability*, such as is involved in the very word *guilty*, upon any one when no other element or attribute of the mind was involved, except memory, and *only memory?*

Can we speak of a man as *guilty of negligence*, or even discuss intelligently the question of *negligence* in any aspect, unless we first bring to its consideration the *direct operation of the human will*, or such a condition of things as presumes this attribute of mind to have had full play?

The very idea of negligence is inseparable from the idea of the *act of the will.* Something *voluntary.* Mere lapse of memory, unassociated with any voluntary act of the will, does not of itself constitute negligence.

An apt illustration of its being so associated with culpability on the part of one who would be guilty of contributory negligence, might be put as follows: A man about to cross a railroad track, when at the distance of one hundred yards from it sees an express train coming at tremendous speed, but as yet some distance away. At the point supposed two ways are open to him to reach the other side of the railroad—one, somewhat circuitous and farther, but *under* the railroad, and so, absolutely safe; the other *over the track* in front of the coming train,which he may, he thinks, easily make if his steps are a little quickened; but at the moment of danger, as it afterwards transpires, *his wits leave him*, and although the engineer may have been and was grossly negligent in the running of the train, yet but for his instant lapse of memory he would have avoided the injuries received.

The man in such case was guilty of contributory negligence; but why, because he forgot on the instant, danger was impending? Surely not; it all lies *back of that*, and relates to the time when, in the full exercise of his faculties, he *chooses* the path of danger instead of that of safety. His plea of forgetfulness cannot help him in that case, because he had already deliberately passed the *danger line*.

And so in every case of negligence it comes to some point of actual deliberation, or where deliberation must be presumed.

But now, was the conduct of plaintiff at any time that of a parallel case? Was he at fault in anything he did up to the fatal moment of *reaching for the step*, or when about commencing the descent of the car?

Was or could there have been deliberation *then?* Any reflection or time for reflection *then?* no matter how deeply impressed with danger his mind may have been; no matter what and how great precaution he may have brought with him to that disastrous descent, if it was a sudden lapse of memory, he was helpless,

VI.

26. Is not this whole case, on the branch of plaintiff's negligence, something of a *psychological question* for the jury?

Plaintiff had reached the south end of the car with step off, in the exercise of due care; as he stood upon the top of that end of the car the moment before the castastrophe he was free from any imputed negligence; he had done what he could to avoid and pass safely over the danger; he had brought his own mind up to a sense of the importance of caution and carried with him a deep impression of it, as the Honorable Court very justly observes in its charge.

27. All these, plaintiff, so far as we can discover from the testimony, carried with him to the end of that car so far as a man may be said to have the ability to *carry his mind well in hand* on any given occasion.

28. Negligence, if any there was, was crowded into the very few seconds following; within those few very brief seconds that then intervened between the plaintiff's start in the descent and his fall, must be crowded, time to think, time to see the way of danger and the way of safety, and having seen the danger and a way of escape, there must be time to act as a reasonable man would have acted, *choose* the one and *avoid* the other.

29. With his left hand upon the *hand-hold* above, or with his *right hand* upon the *wheel* of the brake-rod, or *both*, plaintiff would be taking the *natural* and *proper* way of getting *down;* the point to be attended to, was to remember at the instant of *reaching* for the second step, and then at that instant, the step not being there, grasp for the *brake-rod* by throwing out the hand, (the right hand naturally, that being then disengaged) and take firm hold of that; but here again the sleet that was falling may at that time in the morning, (5 o'clock, A. M.,) have *so glazed over* the round iron rod with ice, and made it so *slippery*, as to have made it dangerous to have even taken hold of it at all.

VII.

30. It may be properly suggested at this point that it is within the range of possibilities surely, if not probabilities, that plaintiff may have had hold of the brake-rod or attempted it, with his right hand, when the accident occurred, *and that very thing have precipitated it.* Plaintiff says, "I don't not remember having hold of any thing with the other hand." Record, 12, folio 34.

"It had been snowing that night." Record, 12, folio 32.

The witness Cresswell, speaking of the circumstances of the accident, says: "It was most bitter cold; the rain was freezing as it fell—a regular winter's storm." Record, 15, folio 42.

31. The fair inference of all the testimony about the weather, is that it had been snowing through the night and which was now turned to rain and sleet. Plaintiff having gone over the cars in the previous part of the night when nothing but snow was falling, had only unconsciously increased the chances of danger; he could then use the iron rod to help himself when nothing but snow was on it; now it was covered and glassy with ice and sleet; it was itself a source of a danger;—a very mantrap, created by the elements within the last hour.

32. Plaintiff may therefore have instinctively taken hold of the brake-rod and thereby hastened his own misfortune; or had he time for consideration may on the moment have, as a *matter of safety, avoided it as a source of danger in itself.*

33. Of course this view of the possible circumstances surrounding the plaintiff's fall is altogether consistent with plaintiff's other testimony, or rather the want of it; it would be unreasonable to suppose that plaintiff after what followed, —the loss of his two legs, (*amputations below the thigh,*) and subsequent suffering, should remember with accuracy, the details of the accident; it is most natural and obvious that plaintiff's mind should be a blank, as to most of what took place at such a juncture, and that all to him should even be clouded in mystery.

34. When therefore he says he "*could have slid down*" *the brake-rod*, it is to be taken more in the sense of plaintiff's then present view of it; looking back over the intervening six years he could then see as he thought, without thinking of its condition, that that was what he *could then* have done, had he *thought about it;* it is not the only and necessary construction of what witness says, that he did not take hold of the rod at all; and especially that he *negligently* avoided doing so, *or that he did not at the time avoid it purposely as dangerous.*

VIII.

35. It might have made a different case, could the Court have found as matter about which there could be no question that plaintiff, when on top of the car, had two distinct and separate ways of transit from one car to the other, the one presented to his mind and senses, as the *obviously safe and proper way*, and the other just as strikingly *unsafe and improper;* but this is one of the things plaintiff desires jury to find whether such a state of things existed. Plaintiff had a right and certainly might well have contended that there was after all but *one proper way of getting down*; and that that was by not taking hold of the brake-rod at all, even when plaintiff had his wits full about him.

36. The first step which was *on the car* must have been about *two feet* from the top of the car. Record, 9, folio 24.

This left a distance to the platform of the car, of perhaps as much as *five feet.* Record, 12, folio 34. See also defendant's diagram of car,—*reference for this matter only.*

The top step, which was on, as all steps have, had a *hand-hold* also. Record, 13, folio 34, and 15, folio 42.

Plaintiff's height was about 5 feet 7 or 8 inches. Record, 12, folio 34.

37. The first thing, with such conditions, then, for plaintiff to do, would be to do *as he did do*—take hold of the hand-hold on top of the car with the left hand, put the foot upon the step which was there, maintain a *firm* hold above until he

fully grasped the *hand-hold of the step* with right hand underneath his foot, (something that he very possibly may have done,—he says he does not remember what he was doing with his *right hand*,) then having taken hold of the step with the *right hand*, removed the right foot, still holding on above, and also to the step with firm hold, and swing the body easily down to within about 18 inches or less of the platform, when he would naturally let go with the left hand at the top of the car, but of course hold on with the right a moment longer, until he reached with his feet the platform. A man of plaintiff's height could easily have done this; and besides, he was very strong in his grip or hold. Record, 13, folio 35.

Plaintiff furthermore swears that this was the right and natural way of getting down. Record, 9, folio 26.

IX.

38. Look at it from what standpoint you will, it comes to this at last, that it was *momentary forgetfulness after plaintiff commenced making the descent*, and that is the testimony of plaintiff. This is in no sense a parallel case with those cited by defendant's counsel, where *one had put himself negligently in the way of danger*.

39. We have shown how, in one of several ways, (*ante page* 16,) the plaintiff's mind may have been so disturbed as to induce this lapse of memory *naturally*, and while in the line of his duty, and exercising the strictest care for his personal safety.

40. It is only for us, as counsel for plaintiff, to show, without of course trenching too strongly upon human credulity, that it *might have been* lapse of memory, *naturally* and *unavoidably induced*, and that the jury might have so found; it is for the defendant's counsel to take the affirmative at this point, and show it could not, by any *reasonable possibility or reasonable inference have been so*, and that the jury could not so have found.

41. All that plaintiff contends for is that, having put in his case, and having made a case of negligence against the defen-

dant, and having himself exercised due care, so long as we have any means of following him up *to the very verge* of the accident, that the conditions surrounding the accident *after that* were such that each and all the circumstances attending it, bristle with such *reasonably doubtful issue of fact*, that we had the right to have had the jury pass upon them.

42. That it was not a case where the only *reasonable inference that could be drawn from all the facts and circumstances of the case*, was that plaintiff was guilty of contributory negligence.

The second, ninth, and tenth errors are therefore properly assigned.

X.

43. It may be important to call the attention of the Court again to the point so prominently made and apparently relied on in defendant's brief: That in the passage from the *south end* of the car with *step off*, to the lumber car immediately in front, there were *two ways*, one a *dangerous way*, and the other a "*comparatively dangerousless way;*" and emphasis is put upon "his previous use of the vertical brake with safety."

44. We have already shown (*ante pages* 11 and 12) that the evidence in the case will bear no such affirmative construction; that with the probable change of weather during the night from simply snow to sleet and ice, and rain freezing upon the iron rod as it fell, that the *brake-rod itself may have become a source of danger* toward morning.

45. Another great error into which the Court seems to have fallen, and which is apparently assumed as a fact in defendant's brief, is, that on the assumption the plaintiff had previously used the *brake-rod*, that he used it *without reference to the hand-hold or the remaining step* on the end of the car; whereas, if he used it at all, it was only *in conjunction with* the hand-hold and remaining step, and that part of the rod *below the little platform* that projected about six inches near the top of the car. Record, 12, folios 33 and 34. The possible use of this rod was, as he testifies, *just when reaching for the missing step.*

"If I had just thought *at that moment* that the step was gone," &c. "If I had just thought that the step was gone, I could, for that matter, have come down on the brake-rod—*slid down on that.*" He could only, of course, *slide down* on the part *below the platform*, and not on that part *above the platform;* and furthermore, if witness' testimony is to be construed as to *what he did do*, and not as saying what he *might* have done, *speculatively*, and very naturally overlooking some important things that may then have been and probably were present, yet it is to the effect that he did not use the vertical rod *alone*, and without the other appliances that were there.

Nor does he admit that it would have been at all safe to have done so; the plaintiff's testimony is: "I had climbed up and down before by taking hold of the brake-rod *with one hand; not the wheel*—the brake-rod; I could *put my foot against the rod*, and I could *hold myself up* and get hold of the *running board* that was there; that is the way I got up and down *both times before*—by the help of the brake-rod and holding on, knowing that this step was not there." Record, 13, folio 35.

46. People who are at all adepts at climbing a slippery pole, generally at least find it necessary to use both feet and both hands; here, whatever use the plaintiff had found he could make of the rod, was with *one* hand only, and putting *one foot* "*against it.*"

47. The Court will perceive that the point of all this, and that that we are contending for, is, that there was not presented to plaintiff when *at the top* of the car, and before he commenced making the descent, a way of safety other than by passing down *over the remaining step*, and *making use* of it; and that therefore the *missing step's place was directly in the path of plaintiff's descent*, whatever *auxiliary* use was made of the brake-rod. It therefore comes again to the point of *momentary forgetfulness*, when plaintiff was just about *half way* down the car—a *matter of the instant*—no difference what the use of the brake-rod, or the *method adopted* in getting down.

48. Before leaving the testimony above set out, we cannot but observe its complete accord with the position taken in

SECTION I, *ante* pages 10, 11 and 12, that while it does appear that plaintiff climbed *up over* the end of the car with the step off twice, it nowhere certainly appears that he climbed *down* over that end of this car.

The "running board" is on the *top* of the car. Record, 9, folio 25, and 10, folio 28.

Plaintiff could hold himself np "and get *hold* of the *running board*" that was there;" this describes the way of getting *up*, not down, and it is the way he "*got up*" *both times* before, where we have seen that he was going in a *northerly* direction, and the opposite way from that he was going when the accident occurred, and he, *both* of these times, "*got down*" at the other end of *that* car, of course, or else the testimony is referable to his getting down off the *lumber car* immediately in front; and either way the jury may have found, reasonably consistent with the whole testimony relative to this controverted or doubtful fact in the case.

49. As applicable to the state of facts here disclosed by the Record or left for reasonable inference at least, we have cases cited by the defendant's counsel, of which there are very many to be found on this branch of law, the purport of which is, that the plaintiff in any case to recover for personal injuries received, must, in exercising due care, "*use his senses, as men generally use their senses to keep from harm*;" the application of this principle rests upon the assumption that there was a distinct and absolutely safe way of passing to the car in front, and not only a way that was safe, but a way that was *obviously safe and preferable to a dangerous one there present*, and so *strikingly so* that plaintiff had only *to use his senses and see it*; the fault of the whole argument is that there was in fact no *safe way* of *passage at all*, neither by jumping, nor *via* the *vertical rod*, nor *via* of the *step* that was left. And again, before there is any room for the application of this class of cases there must be present *the necessary conditions for using one's senses*; in this case it was *night*, between 4 and 5 o'clock A. M. on a *stormy winter night*, plaintiff could not use the *sense of seeing*; there was nothing in the nature of the case, by which the *sense of hearing* could avail him in any way; the same may be said of the *sense*

of smell, and *sense of taste*; there was but *one other sense* left the plaintiff, *that of feeling*, and unfortunately for the argument of the other side just at this point, it was the *sense of feeling that the plaintiff was using* when the accident was precipitated; *feeling for the missing step with his left foot*, when the accident came to him; using the only sense that was left him, *and which men ordinarily use in the dark*, at the very moment of the accident.

XI.

50. Upon sound legal principle, the gist of all the adjudged cases in actions of this kind, and in which no recovery could be had because of the negligence of the plaintiff contributing to the accident, is simply that the party suing had himself done a reckless thing, had placed himself recklessly, carelessly or negligently in the way of danger, or placed himself in a dangerous position *unnecessarily*—in all of which cases he must then take the consequences of his own acts, *even if he did afterwards forget*, the negligence being referrable to his prior act *of putting himself where he was* when the accident happened.

And no case it is assumed can be found or will be cited in this Court, setting forth the proposition that the mere infirmity of the mind, *in forgetting* at a critical juncture, is *per se* negligence, *and a fact to be found as such as matter of law by the Court.*

Such a proposition pushed to its legitimate extent is something *startling and abhorrent*; it charges upon a man *culpability* attaching to his acts, when no longer a free agent; *charges the infirmities of his nature with a penalty and punishment*, and strongly reflects upon Creative Wisdom Itself.

51. Were that attribute of the mind called memory, something of the nature and function of an "*alarm clock*," which might at will be *so set* and adjusted as to strike the alarm upon any given contingency, and thus in some mysterious way, calling up before the "*mind's eye*" the danger at the precise time when warning was needed, then there were indeed some ground in a case like the one at bar for the charge of negligence and in

such a contingency; but the Court will observe that then and in such case, the plaintiff's negligence would have been not in the failure of the *clock* to *strike* at the required time and point of danger, but his negligence would have been referable to *his act of omission* in the caboose, in *not setting* the clock *with the alarm on*, when there was ample time and opportunity for attention to all the necessary preliminaries for his personal safety.

XII.

52. That the plaintiff had exercised reasonable care and even extra precaution up to the very time of the accident, and that it was then *momentary forgetfulness*, over which plaintiff had no control, *are just the facts which the jury, upon consideration of the whole evidence, could and would most probably have found.*

The jury should, therefore, have been allowed so to find, and to further find that plaintiff *was not guilty* of contributory negligence.

Could the Court determine these questions as matter of law?

Unless negligence was the only possible inference to be drawn from the fact of not remembering under all the circumstances that the step was off, then the Court could not declare as matter of law that plaintiff was guilty of contributory negligence.

Johnson vs. Brunner, 11 P. F. Smith, 63.
Connecticut Mutual Life Ins. Co. vs. Lathrop, 111 U. S. 612 and 615.
Phoenix Insurance Co. vs. Doster, 106 U. S. 30, 32.
Manchester vs. Ericsson, 105 U. S. 347 and 349-50.

There was error, therefore, in the whole charge of the Court so far as the same charged negligence of the plaintiff, and the *eighth* and all other errors are properly assigned.

It is therefore respectfully submitted that the judgment should be reversed and cause remanded, with directions to set aside the verdict and award a new trial.

JAMES H. GABLE,

AND WITH HIM

N. DUBOIS MILLER,

W. F. BAY STEWART,

Counsel for Plaintiff in Error.

APPENDIX.

EDWARD KANE,
Plaintiff in Error,

vs.

NORTHERN CENTRAL RAILWAY COMPANY.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1887. No. 84.

AGREEMENT OF COUNSEL.

It has been agreed by counsel, and the agreement filed in this case with Clerk of this Court: "That the last two words on page 11 of the printed Record, and the first three lines of page 12 of the same, be stricken out, viz: the words 'I did not have my coat and gloves, because I stayed there eating my breakfast until the train was in motion, and then went off in a hurry; there was more safety without them;' and in their place shall be substituted the following:

Q. 'Did not you leave both your coat and your gloves because you stayed there eating your breakfast until the train was in motion, and then you went off in a hurry?'

A. 'No, sir; there was more safety without them.'

"And it is agreed that the said omissions and substitutions shall also apply to the same passages as they occur in the original bill of exceptions."

JAMES H. GABLE,
N. DUBOIS MILLER,
For Plaintiff in Error.

WAYNE MACVEAGH,
For Defendant in Error.

Philadelphia, November 8, 1887.

No. 84. October Term, 1887.

IN THE

Supreme Court of the United States.

EDWARD KANE,
Plaintiff in Error and Plaintiff below,

vs.

NORTHERN CENTRAL RAILWAY COMPANY.

Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Brief of Defendant in Error.

A. H. WINTERSTEEN,
WAYNE MACVEAGH,
For Defendant in Error.

ALLEN, LANE & SCOTT, PRINTERS, PHILADELPHIA.

Supreme Court of the United States.

Edward Kane

vs.

Northern Central Railway Company.

October Term, 1887.

No. 84.

STATEMENT OF THE CASE.

The plaintiff was injured February 29th, 1876, by falling from a freight car and being run over by part of a train of cars on which he was employed by the defendant as brakeman. The accident took place near Coldfelter's station on the defendant's line of railway between Marysville and Baltimore, as the train was moving south from Marysville to Baltimore. A lower step or rung at the end of the third freight car from the rear of the train, properly belonging on the car to assist trainmen in getting up and down was missing.

For the sake of clearness of apprehension two drawings of the end of an ordinary freight car are appended to the brief. Plate I. represents a direct view. Plate II. represents a lateral view. An additional drawing, Plate III., is inserted showing the end of a freight train such as that on which the accident occurred, and the location of the different points referred to in the testimony.

The plaintiff in getting down from the car released his hold of the hand hole at the top of the car, and finding no foothold below, fell to the platform of the car and thence to the track, and received his injuries from the last three cars and the caboose passing over him.

He had become aware of the absence of the step from the car some time before the accident, when the train was at York

Haven, a stopping place several miles up the track. (Record, folios 19, 21.) He mentioned the fact to the conductor, who promised with the acquiescence of the plaintiff that if there was no perishable freight in the car, he would drop it from the train at the coal yard or Hanover Junction, a stopping place a short distance beyond the place where the accident occurred. (Folio 21.) The plaintiff's station on the train was at the eighth or tenth car from the rear. He passed between this point and the caboose over and down the cars twice after discovering the absence of the step. (Folios 19, 31, 35.) Each time remembering the absence of the step from the car, he got up to the top and down to the platform by using the rod of the upright brake by the side of the ladder. (Folio 35.) At the time of the accident he was returning to his station on the train from the caboose where he had delayed, eating his breakfast, until after the train started. It was a cold, snowy night, and to enable himself to hold on better, as he testifies, knowing that he "had bad cars to get over," he left his gloves in the caboose. Getting down the car the ladder of which was defective, he loosened his hold above without thinking that the lower step was gone, and therefore without being able to feel any step on which to rest his foot.

Testimony, page 13, folio 35:—

Q. You loosened your hold above?

A. Yes, sir. If I had just thought at that moment that the step was gone, I am strong enough to hold my weight with two fingers—right at that moment getting down if I had just thought that the step was gone, I could for that matter have come down on the brake rod—slid down on that; I had climbed up and down before by taking hold of the brake rod with one hand, not the wheel—the brake rod; I could put my foot against the rod, and I could hold myself up and get hold of the running board that was there; *that is the way I got up and down both times before by the help of the brake-rod and holding on, knowing that this step was not there.*

The court, after hearing the plaintiff's evidence, gave binding instructions to the jury to find for the defendant, because of contributory negligence on the part of the plaintiff.

ARGUMENT.

The proper ground upon which the court directed the non-suit was that where the plaintiff has so far contributed to the injury by his want of ordinary care that, but for such want of ordinary care on his part, the injury would not have been done, the railway is not liable to him in damages for such injury.

Patterson's Railway Accident Law, section 45, and cases there.

Passing by the question of the possible want of negligence of the defendant, or of its non-liability to the plaintiff for negligence or carelessness of the co-employé or co-employés whose duty it was to inspect and remove from the train the defective car,—questions that under another view of the law of contributory negligence than that taken by the court would be of the first importance to the defendant—the court below directed a verdict for the defendant because of want of ordinary care in the plaintiff in the manner of his using the defective car.

The two questions for this court are, therefore:—

I. *Was the plaintiff guilty of such want of ordinary care that the accident would not have happened without this carelessness?*

II. *Was it the province of the court to decide as to the fact of this contributory negligence?*

These questions, it is conceived, must be answered affirmatively.

I.

Was the plaintiff guilty of such want of ordinary care that the accident would not have happened without his carelessness?

The plaintiff was an old railroad hand, having been in railroad service since 1873 (page 11, folio 30), and in the employ of the defendant over a year (page 7, folio 20).

He was aware of the dangerous condition of the car, and under promise from the conductor that the danger would be removed by side-tracking the car at the first convenient place, he chose to continue its use. Mindful of the danger for a time,

he twice climbed up and down the defective car, by the use of the vertical brake by the side of the ladder, which he testified he could do very well. *At least once before the accident, while going in the same direction he was going when the accident occurred*, viz., in a southerly direction from the caboose at the end of the train to his station on the train, *he climbed down the defective car* by the use of this vertical brake by the side of the ladder. This is shown in the additional testimony inserted at the end of this brief by agreement of counsel. (*Infra*, pages .) The storminess of the night suggested caution and the utmost attention to his own safety. There were no complex duties in connection with the car to distract his attention from the danger of using the defective ladder.

Testimony, page 13, folios 36 and 37 :—

When the accident happened I was going to my place on the train. *I had no other duty on the top of the cars*, as the train was moving off, unless the engineer calls for a signal.

* * * * * * *

I don't know that I gave any signal at this particular time. Can't remember how my mind was occupied, *only going to my post; my mind was on that.*

He was in the simple act of going over and down the car (nothing else) to his station on the train, and had both a dangerous and a comparatively dangerless way of doing so. Whether by forgetfulness or otherwise, he chose the dangerous way and met with the accident. From his previous use of the vertical brake with safety there can be no pretense that the accident would have happened had he continued to use it instead of using the defective ladder.

On these facts, under the decisions, there was certainly a want of ordinary care on the part of the plaintiff which would preclude him from recovering.

Where a servant has equal means of knowing the danger, so that the master and servant stand equal in that respect, and the servant is not specifically commanded as to the time and manner in which the work may be done, but is

told to do a particular thing, and has such discretion that he can have some control over the means, time, and manner of doing the work, then, unless he does it in a way and with the means which will be the safest, he is guilty of contributory negligence.

English *vs.* Chicago, M. & St. P. R. R. Co., 24 Fed. Rep., 906.

A mill hand met with an accident by her hand being caught in machinery which she was cleaning. There was a defect in the machinery, without which the accident might not have occurred. Her attention was directed to the defects by the very nature of her work. With care she could have worked upon the machinery without injury. The court held there was contributory negligence which required the setting aside of a verdict for the the plaintiff.

Shanny *vs.* Androscoggin Mills, 66 Me., 420;

Foy *vs.* Buchanan, 4 N. Y. State Reporter, 894.

In the course of its opinion in affirming the judgment of the lower court in Northern Pacific Railway Company *vs.* Herbert, 116 U. S., 642, this court, speaking by Mr. Justice Field, stated the principle according to which such cases as the present are to be determined, as follows: "As to the alleged negligence of the plaintiff only a few words need be said. *Of course he was bound to exercise care to avoid injuries to himself.* If he had known, or might have known by ordinary attention, the condition of the brake and cars when he mounted the cars, and thus exposed himself to danger; in other words, *if he did not use his senses as men generally use theirs to keep from harm, he cannot complain of the injury which he suffered.*" The plaintiff in this case met with an injury to his leg while using a defective brake. A verdict in his favor was left undisturbed, because there was no sufficient evidence that he knew of the defect.

The court in another class of railroad cases had previously insisted upon the rule that the negligence of the defendant does not relieve the plaintiff of the duty of caring for his own safety. Thus in Railroad Company *vs.* Houston, 95 U. S., 697, followed in Schofield *vs.* Chicago, Milwaukee & St. Paul

Railway Company, 114 U. S., 615, it was held that the neglect of the engineer of a locomotive of a railroad train to sound its whistle or ring its bell on nearing a street crossing does not relieve a traveler in the street from the necessity of taking ordinary precautions for his safeiy. "Before attempting to cross the railroad track, he is bound to use his senses—to listen and to look—in order to avoid any possible accident from an approaching train. If he omits to use them, and walks thoughtlessly upon the track, or if using them, he sees the train coming, and instead of waiting for it to pass undertakes to cross the track, and in either case receives an injury, he so far contributes to it as to deprive him of any right to complain. If one chooses in such a position to take risks, he must suffer the consequences. They cannot be visited upon the railroad company."

The case of District of Columbia *vs.* McElligott, 117 U. S., 621, contains an instructive discussion of the law of contributory negligence as to such cases as the present. The plaintiff McElligott, an employé of the defendant, the District of Columbia, was injured by the fall of a gravel bank under which he was working in the course of his employment. The bank was in a dangerous condition, and there was evidence that the fact was communicated to the supervisor who had charge of the work for the defendant, and that he promised to send a man to watch it.

The trial judge charged the jury (*inter alia*) that if the plaintiff notified the supervisor of the dangerous condition of the bank and requested him to send a man to watch it, and he gave assurance in reply that a man would be sent there for that purpose, the plaintiff might labor without any imputation of any negligence on his part for such a length of time as within which that promise might be fulfilled. A verdict was had for the plaintiff. This court, in reversing the judgment, declared the above charge to be a misdirection, and reasserted the obligation of the employé to exercise due care after, as well as before, the promise to repair the defect complained of. Said Mr. Justice Harlan, in concluding the opinion of the court: "If liability might come upon the District for the negligence of its officers controlling his (the employé's)

services, he was under an obligation to exercise due care in protecting himself from personal harm while discharging duties out of which such liability might arise. If he failed to exercise such care; if he exposed himself to dangers that were so threatening or obvious as likely to cause injury at any moment, he would, notwithstanding any promise or assurance of the District Supervisor of the character alleged, be guilty of such contributory negligence as would defeat his claim for injuries so received." See also

Tuffy *vs.* Warman, 5 C. B. N. S., 573;
Williams *vs.* Holland, 6 Car. & P., 23;
Burn *vs.* Delaware L. & W. R. R. Co., 13 N. Y. S. C., 303;
Toomey *vs.* Turner, 31 N. Y. S. C., 599;
Becht *vs.* Corbin, Receiver, 92 N. Y., 658;
Dunn *vs.* Railroad, 78 Va., 645;
Rudd *vs.* Richmond & Danville R. R. Co., 23 Am. & Eng. R. R. Cases, 253;
Chicago & N. W. R. R. Co. *vs.* Jackson, 55 Ill., 492.

It is but another application of the principle enforced in these cases to declare, as the lower court practically did declare in our own, that even if a railroad company is negligent in furnishing a defective car to a brakeman, and promises through its proper officers to repair the defect, the brakeman is still bound, if he use the car at all, to keep constantly in mind its defects and to avoid them if possible.

The plaintiff himself having testified that he could have performed his duties on the car with perfect safety by continuing to use the vertical brake instead of the defective ladder until, as agreed upon, the car could be side-tracked a short distance beyond the place of the accident, and that by reason of his own oversight he neglected to do this, there was, under the decisions, a clear case of contributory negligence made out.

II.

Was it the province of the court to decide as to the fact of this contributory negligence?

It will be observed that the real question in the case is not whether the plaintiff, under the circumstances, was guilty of contributory negligence in continuing in his employment as

brakeman upon a defective car after discovering that it was in a dangerous condition. It is conceded that, in accordance with the decision in Hough *vs.* Railway Company, 100 U. S., 224, as explained in District of Columbia *vs.* McElligott, 117 U. S., 632, it may be a question for the jury to say whether an employé under all the circumstances is negligent in remaining at his work after discovering its danger and a promise is given him that the danger would be removed. The law is so declared generally.

See Laning *vs.* New York Central Railroad Company, 49 N. Y., 521;

Patterson *vs.* Pittsburg & Connellsville R. R. Co., 76 Penna. St., 389;

Ford *vs.* Fitchburg R. R. Co., 110 Mass, 261.

But no question such as this arises here. Supposing it to have been in no respect imprudent for the brakeman to continue at his work while the car was out of repair, the only real question in the case is, *was he negligent in the manner of his use of the defective car.*

There was no dispute as to the facts, as there was in the recent cases, Cunard Steamship Company *vs.* Cary, 119 U. S., 245, and Chicago & Northwestern Ry. Co. *vs.* McLoughlin, *Id.*, 566, where submissions to juries of issues of contributory negligence were approved by a divided court. The defendant offered no testimony, and, for argument's sake, conceded the truth of that submitted for the plaintiff. The plaintiff himself testified he could have used the car with perfect safety by sliding down the vertical brake. He did not do this at the place of the accident, but carelessly resorted to the defective ladder. Moreover, after getting upon the ladder he let loose his hold upon the top rung before his feet rested upon anything below. This method of using the ladder was itself careless, even if the ladder had had all its rungs. Not only were the facts undisputed, but it would seem there was but one inference from them, namely, that of negligence in the plaintiff without which negligence the accident could not have happened. It was then eminently the province of the court to decide as matter of law that there was contributory negligence, and to direct a verdict for the defendant. This course

was required by repeated precedents in this court. When, after giving the plaintiff the benefit of every inference that could fairly be drawn from the evidence it is insufficient to authorize a verdict in his favor, so that such a verdict, if returned, must be set aside, a peremptory instruction for the defendant is proper.

Marshall *vs.* Hubbard, 117 U. S., 415; citing
Pleasants *vs.* Fant, 22 Wall., 116, 143;
Montclair *vs.* Dana, 107 U. S., 162;
Randall *vs.* Baltimore & Ohio Railroad, 109 U. S., 478, 483;
Anderson County *vs.* Beal, 113 U. S., 227, 241;
Baylis *vs.* Travellers' Ins. Co., *Id.*, 316, 320.
See also Schofied *vs.* Chicago, M. & St. Paul Ry. Co., 114 U. S., 615, 619, and cases there cited;
Hathaway *vs.* East Tenn., Va. & G. R. R. Co., 29 Fed. Rep., 489; and the very recent case
Goodlett *vs.* Louisville & Nashville Railroad, 122 U. S., 391, 411.

In Railroad Company *vs.* Jones, 95 U. S., 439, it was held as a matter of law to be contributory negligence for a workman to ride on the pilot of an engine when he could have ridden with safety in the box car, and a peremptory instruction to find for the defendant, the court declared, would have been proper.

Practically the same ruling was made in Doggett *vs.* Illinois Central R. R. Co., 34 Iowa, 284. In Cunningham *vs.* Chicago, M. & St. Paul Ry. Co., 5 McCrary, 465, Mr. Justice Miller of this court, sitting as Circuit Justice, set aside a verdict for the plaintiff on the following facts: A, who was a brakeman in the employ of the defendant railroad company, attempted to board a switch engine, in connection with which he was working, by stepping on the rear foot-board of the engine, which was approaching him tender first. He stood in the middle of the track, and the engine was moving at the rate of from one to three miles an hour. The hand-rail of the tender was off and the rear foot-board was partly broken, which showed negligence on the part of the railroad company. But the contributory negligence of the employé was controlling, and the

learned justice, according to the syllabus of the report, ruled as follows: *If a man voluntarily and unnecessarily puts himself into a dangerous position when there are other positions he may take in connection with the discharge of his duty, he cannot recover damages for that injury to which he has contributed by his own negligence.*

A brakeman on a passenger train was injured in a collision by the platform of a combination car immediately in advance of the coach on the platform of which he was standing being driven over and upon the platform of the coach. The platform of the combination car was higher than the platform of the coach, and it was this fact which made it possible for the one platform to be driven over the other. The plaintiff knew the dangerous condition of the cars, and, upon testifying to the fact, was promptly nonsuited. The Supreme Court of New York, in sustaining the entry of a nonsuit, said: *The brakeman* of a *railroad company is charged with knowledge of the obvious condition of the structures, &c., of the cars with which he is to perform his duties, and he cannot recover for injuries arising from defects of which he had knowledge.*

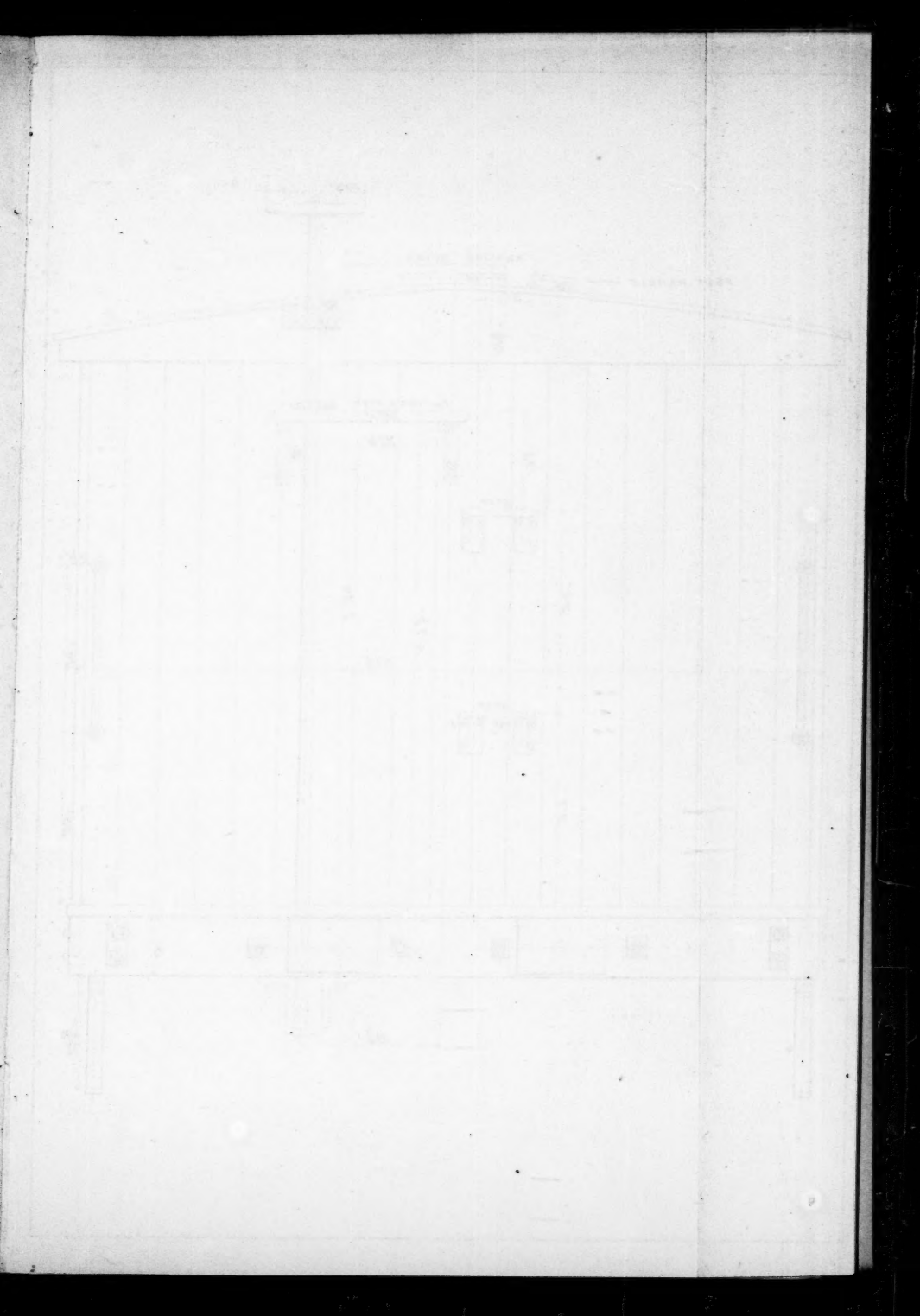
Ferguson *vs.* Fall Brook Coal Company, 4 N. Y. State Reporter, 423 (1887).

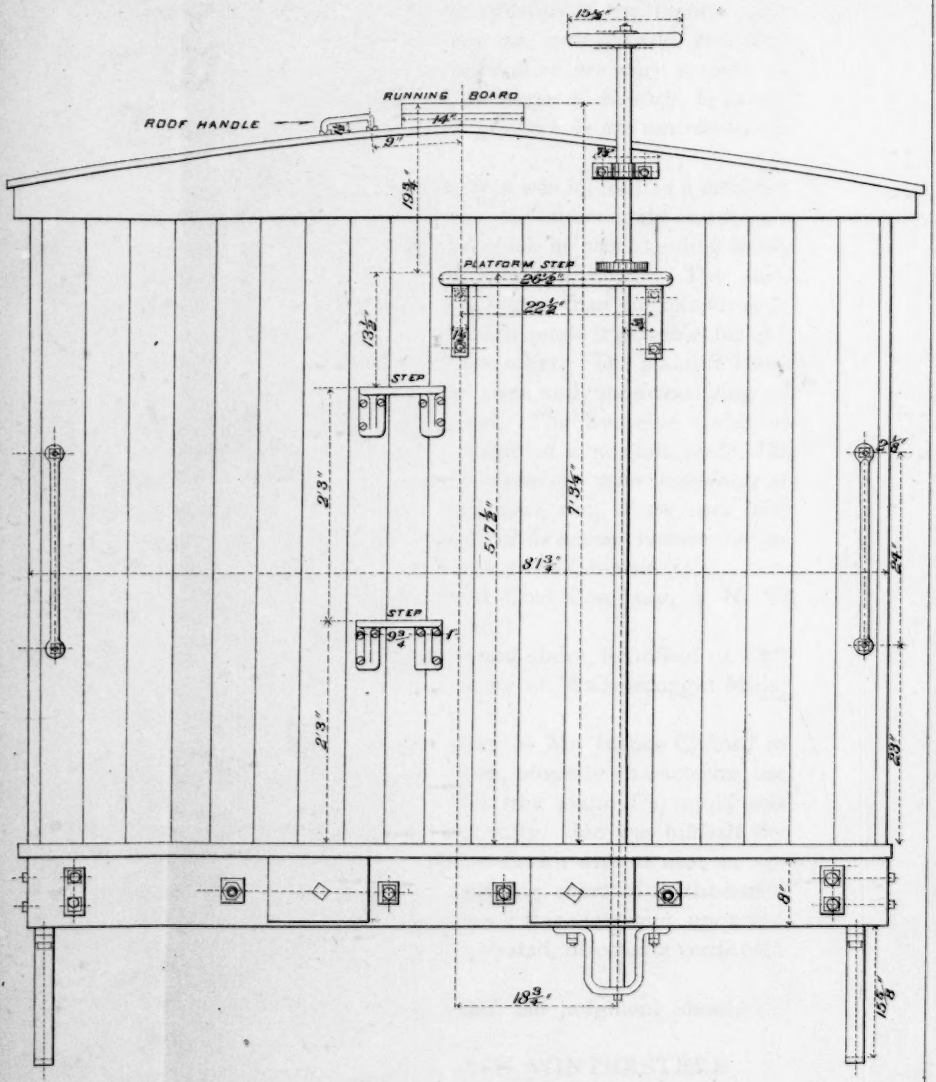
See in connection the cases cited above, Schofield *vs.* Chicago, M. & St. P. Ry. Co.; Shanny *vs.* Androscoggin Mills; Foy *vs.* Buchanan.

It is believed that the remarks of Mr. Justice Clifford in Railroad Company *vs.* Jones, *supra*, properly characterize the facts of the present case. "His (the plaintiff's) injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit." The court below took this view, and, upon the principles and practice above illustrated, directed a verdict for the defendant.

This, we claim, was proper and the judgment should be affirmed.

A. H. WINTERSTEEN,
WAYNE MACVEAGH,
For Defendant in Error.




RUNNING BOARD
ROOF HANDLE
14"
9"
19½"
PLATFORM STEP
26⅝"
22½"
13½"
STEP
STEP
23"
23"
5'7½"
7'3½"
81¾"
24"
23"
8"
18¾"
15⅜"

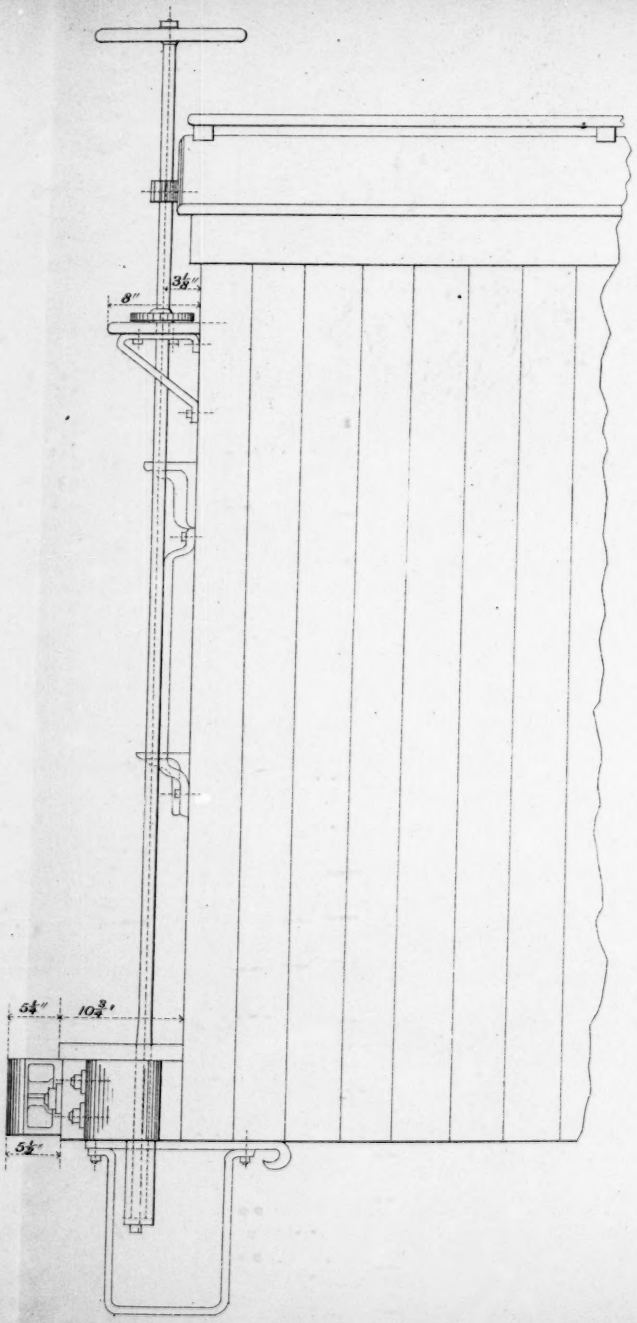
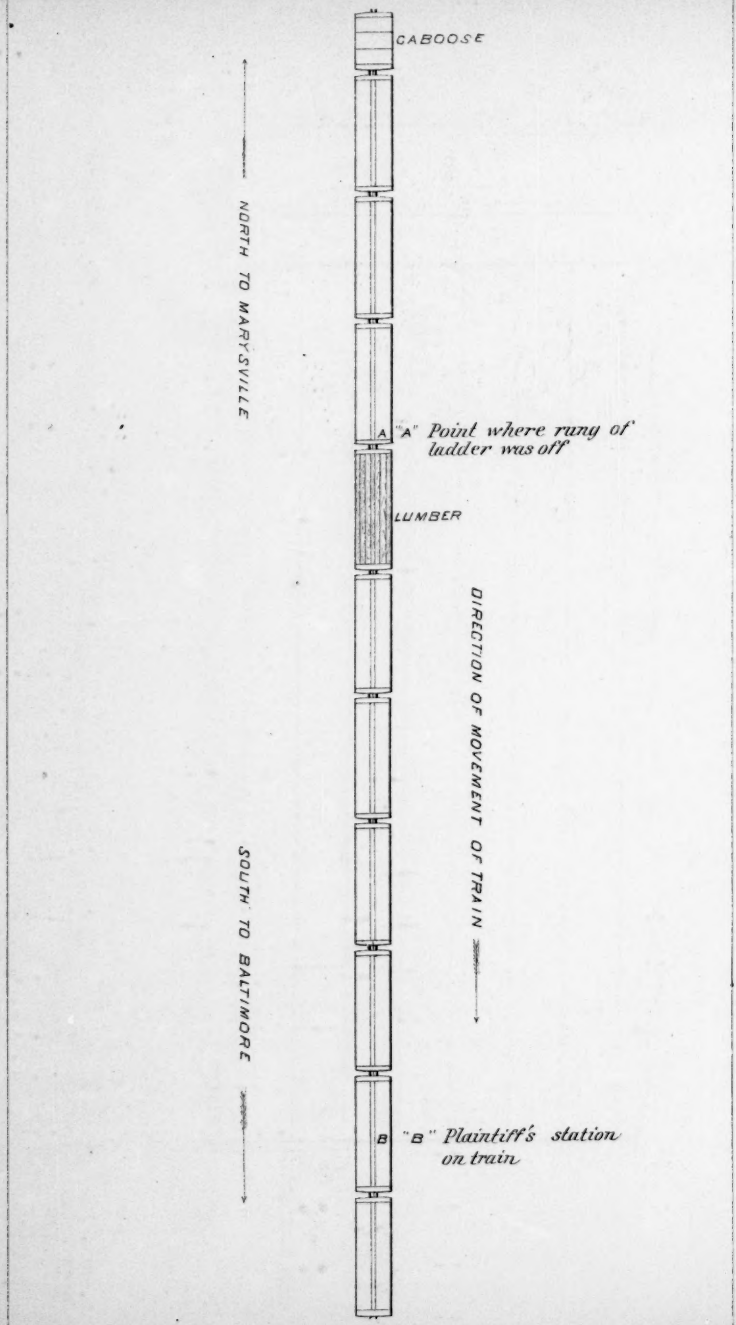

3⅛"
8"
5¼"
10¾"
5½"

PLATE III


CABOOSE
NORTH TO MARYSVILLE
A "A" Point where rung of ladder was off
LUMBER
DIRECTION OF MOVEMENT OF TRAIN
SOUTH TO BALTIMORE
B "B" Plaintiff's station on train

APPENDIX.

AGREEMENT AS TO ADDITIONAL TESTIMONY.

SUPREME COURT OF UNITED STATES.

Edward Kane, Plaintiff in Error,
vs.
Northern Central Railway Company.

October Term, 1887.
No. 84.

It is hereby agreed that the following testimony omitted from the bill of exceptions and from the record by mistake, be inserted in and be made part of the said bill of exceptions and the record with the same effect as if certified as such and duly printed in the transcript in the case.

It is agreed that the said matter be inserted in the printed transcript at page 11, folio 30, between the sentences :—

"It is likely I got off there if it stopped any time," and "When we left York I did not go over the cars from the caboose to my station."

It is further agreed that the said testimony so omitted shall be printed in the brief of the defendant in error together with this agreement, and the said matter so printed may be referred to by either side as part of the record in the case.

Q. You don't have any specific recollection of any of the incidents on that trip from Marysville to York Haven ?

A. No, sir.

Q. In which direction did you go when you found the step off the car ?

A. The train was going south and I was going north.

Q. You were going towards the caboose?

A. Yes, sir.

Q. What was your object in doing that?

A. To put the brakes down.

Q. You were braking it at York Haven before it stopped?

A. Yes, sir; did it to make it stop.

Q. You were going towards the caboose?

A. Yes, sir.

Q. And you had braked five cars?

A. I don't know whether I had put down five brakes or how many.

Q. Is it usual for you to put down five brakes at York Haven?

A. It depends on how you are running how many brakes you have to put down.

Q. You don't remember how you were running that night? You were running on coal train schedule?

A. Yes, sir.

Q. Not on fast freight schedule?

A. No, sir.

Q. Do you think it is probable you braked as many as five cars at York Haven?

A. No doubt I did.

Q. What is the grade there?

A. I don't know.

Q. Is there any?

A. Oh, yes, sir.

Q. Considerable?

A. Yes, sir. If there is a train standing at the water-plug, which we don't know but might be, and if we didn't brake before we got around there we might run into it.

Q. That would depend on the way in which the train was coming along, wouldn't it?

A. Yes, sir.

Q. But ordinarily a train on coal train schedule coming to the water station at York Haven do you brake as many as five cars?

A. I might do it, and I might not. It depends.

Q. The number of brakes you would put down would depend also on the size of your train, largely?

A. Yes, sir.

THE COURT:—I understood the witness to say from the station he applied the brake on several cars. Is that what he means?

MR. MACVEAGH:—No; he means that he passed over the cars to do it.

Q. This was what is known as a single train twenty-five cars?

A. Yes, sir.

Q. You frequently haul from Marysville to Hanover Junction twice that many?

A. No, sir. Not twice that many.

Q. A great many more than that?

A. Yes, sir.

Q. This was a single train?

A. Yes, sir. We might get an ore dump and haul twice as many.

Q. Were not forty-four cars a double train at that time?

A. No, sir; I have seen many more than that.

Q. That was a double train. At least forty-four cars, don't you think?

A. That I don't know. I didn't take the numbers.

Q. Was this more than half as many cars as you frequently saw hauled between those points? Haven't you seen trains twice as large as this frequently?

A. I suppose I have. I have seen one hundred and sixteen in a train.

Q. Did you go back over your train at York Haven to the caboose?

A. Yes, sir.

Q. Then you got down off of this car at the south end, and on the lumber car and over it and down over the two other cars?

A. I didn't have to climb down all of them. I jumped from one to the other.

Q. You did pass as a matter of fact clear from your station

back to the caboose at York Haven and got down into the caboose?

A. Yes, sir.

Q. When you left York Haven after taking water you went back over the same train to your station?

A. Yes, sir.

Q. After leaving York Haven you went back from the caboose over eight or nine cars to your station?

A. Yes, sir.

Q. And remained there until the train stopped at Coldfelter's?

A. Oh, no.

Q. Where did you go?

A. I—we had to go to York.

Q. You went from York Haven to York?

A. Yes, sir.

Q. There you left some cars and did some shifting?

A. We had to go down grade there.

Q. There you braked your cars again?

A. Yes, sir.

Q. And went to the caboose at York?

A. Yes, sir.

Q. How far did you go?

A. I didn't go to the caboose. Coming into York we don't need any brake only one or so to come down the grade.

Q. You did the braking that was necessary?

A. Yes, sir.

Q. Then while you were at York where two cars were shifted out were you in the caboose?

A. No, sir.

Q. You remained at your station there?

A. Oh, no; I helped to do the shifting work.

Q. You don't know the position those cars that you shifted had in the train? You don't remember that? The cars that you left at York?

A. No, sir; I can't say that.

Q. You don't know whether they were the rear end of your train or the middle of it?

A. Most likely they were the front part of the train.

Q. Then when you left York did you go over the cars from the caboose to your station?

A. No, sir.

It is further agreed that the printed transcript of record be further amended as follows:—

That the sentences page 10 folio 28, reading as follows: "York Haven is about twenty miles from Marysville. I guess we had a smooth run down from Marysville," be made to read as follows:—

York Haven is about twenty miles from Marysville, I guess. We had a smooth run down from Marysville.

JAMES H. GABLE,
For Edward Kane, Plaintiff in Error.

WAYNE MacVEAGH,
For the Northern Central Railway Company.

No. 84. October Term, 1887.

IN THE

Supreme Court of the United States.

EDWARD KANE,
Plaintiff in Error,

vs.

NORTHERN CENTRAL RAILWAY COMPANY.

Reply-Brief of Defendant in Error.

A. H. WINTERSTEEN,
WAYNE MACVEAGH,
For Defendant in Error.

ALLEN, LANE & SCOTT, PRINTERS, PHILADELPHIA.

Supreme Court of the United States.

Edward Kane

vs.

Northern Central Railway Company.

October Term, 1887.

No. 84.

The plaintiff in error having withdrawn his brief first filed in this case to which the original brief filed by defendant in error was a proper reply, it is necessary to file this supplementary brief replying to the points advanced by the plaintiff in error in his second brief.

Ten assignments of error are printed in the brief relating to certain portions of the charge of the court. Under the law and practice these errors are not properly assignable and cannot be noticed. They are not based upon any exceptions taken at the trial of the case in the court below, and merely consist of portions of the charge bodily taken from the printed Transcript of Record, and excepted to here for the first time by assigning them for error. It will be observed also that the bill of exceptions contains nothing but a general exception to the charge and opinion of the court. See Record, page 17, folio 49.

It is the settled law of this court that exceptions to the charge which do not clearly and specifically point out the objectionable part cannot be considered.

Washington and Georgetown R. R. Co. *vs.* Varnell, 98 U. S., 479;

Connecticut Mut. Life Ins. Co. *vs.* Union Trust Co., 112 U. S., 250;

Burton *vs.* West Jersey Ferry Co., 114 U. S., 474.

It is obvious, therefore, that no weight can be given to these ten assignments of error as such. The only assignments that

need or that can be considered are the two contained in the Transcript of Record, page 6, folio 16, that the learned judge erred in holding that under the evidence the plaintiff was guilty of contributory negligence, and that under the evidence the jury must find a verdict for the defendant. The whole charge, therefore, must be taken as a whole, and cannot be dissected into parts and objection taken to the several parts.

It is believed, and it is confidently reasserted, that the evidence in the case warranted no other direction to the jury than that given by the learned judge in the court below. In order to support his somewhat metaphysical argument, the plaintiff in error has constructed his own theory of the facts upon which to construct his own theory of the law growing out of those facts. In the face of the plain and uncontradicted evidence in the case it is submitted that it is useless for the counsel of the plaintiff in error to assert that his client did not go over the cars with safety twice before the accident, and that one of these times he did not go over and down the particular car in question in the same direction he was going when the accident occurred. It is very material to the case to know what the evidence discloses as to this. The testimony of the plaintiff in errer, page 13, folio 35, at which point the evidence related only to the car in question, is as follows: "*I had climbed up and down before, by taking hold of the brake-rod with one hand.* * * * *That is the way I got up and down both times before.*" This can mean nothing else than that the plaintiff in error had got up and down the particular car in question. There is, therefore, no room for the theory of the plaintiff in error that the words "up and down" refer to going up and down contiguous cars. The plaintiff in error having testified thus, that he climbed up and down the car, he was only bearing out a former portion of his testimony printed in previous brief of defendant in error, pages 13 and 14:—

Q. You did pass, as a matter of fact, clear from your station back to the caboose, at York Haven, and got down into the caboose?

A. Yes, sir.

Q. When you left York Haven, after taking water, you went back over the same train to your station?

A. Yes, sir.

Q. After leaving York Haven you went back from the caboose over eight or nine cars to your station?

A. Yes, sir.

In going back from the caboose to his station on the train, as will be seen by reference to Plate 3 in the original brief of defendant in error, the plaintiff would have to go down the car at the point A. It is therefore as plain as human testimony can make it, that the unfortunate plaintiff in error did go up and down this defective car twice before the accident, and once *down* the car by the use of the vertical brake at the side of the ladder.

If, therefore, a plaintiff has with safety once done a thing, and that method of doing the same thing remains open to him and he prefers a more dangerous way, the negligence is open and palpable.

The theory of the plaintiff in error upon which a somewhat metaphysical argument is printed in the brief is, that the plaintiff was guilty merely of momentary forgetfulness, which is attempted to be distinguished from negligence. This attempted legal distinction between momentary forgetfulness and negligence, it is believed, is the first distinction of the kind ever suggested in a court of justice. The very essence of negligence is forgetfulness. No man is deliberately and purposely negligent. Negligence is defined by Alderson, B., in Blythe *vs.* Birmingham Water Works Co., 11 Exch., 784, as "the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do."

The definition of Dr. Wharton in his work on Negligence is as follows:—"Negligence in its civil relations is such an inadvertent imperfection by a responsible human agent in the discharge of a legal duty as produces an ordinary and natural sequence or damage to another."

Wharton on Negligence, section 3.

Contributory negligence, it is obvious, is nothing but *such inadvertent imperfection* by a plaintiff which causes or contributes to his own injury. In other words, the very essence of negligence is inadvertence, and the momentary forgetfulness

which the plaintiff in error emphasizes can mean nothing else than momentary negligence.

It is stated in the brief of the plaintiff in error that it is assumed that no case will be found or will be cited in this court setting forth the proposition that the mere infirmity of the mind in forgetting at a critical juncture, is *per se* negligence, and a fact to be found as such as matter of law by the court.

There is no warrant for this assumption. The cases cited in the brief of the defendant in error heretofore filed conclusively establish this proposition. The case of Shanny *vs.* Androscoggin Mills, 66 Maine, 420, is itself a case in point. There, there was nothing but a momentary forgetfulness or infirmity of mind on the part of the girl working at the machinery. By reason of this momentary forgetfulness of mind her hand was caught in the machinery. She suffered injuries for which, the court held, she could not recover, because of this momentary forgetfulness or infirmity of mind. The only cases in which momentary forgetfulness or infirmity of mind which leads to an accident is not sufficient to defeat a plaintiff's recovery are these four: (1.) where persons are distracted by sudden terror; (2.) persons of unsound mind and drunkards; (3.) persons deprived of their senses; (4.) infants. It is not pretended that the plaintiff's case is brought within any of these exceptions. He was a man of full vigor, perfectly intelligent and competent in every respect to take care of himself. He was not distracted from attention to the defect in the car by the performance of his duties. He not only knew of it, but had previously gone over the cars mindful of it. He was doing nothing else than going from the caboose to his place on the train. Any preoccupation of mind under these circumstances was itself contributory negligence.

Another ingenious theory of the plaintiff in error is that this momentary forgetfulness did not make him *guilty* of contributory negligence. It is argued that inasmuch as he was not feloniously culpable that therefore he was not negligent. This, it is submitted, is a mere play on words. A man is guilty of

contributory negligence in law when he is properly chargeable with it; when, in other words, he has, in the language of the definition "done or omitted to do what he should not have done or omitted to do." Tested by these considerations, the plaintiff was negligent. It matters not, therefore, whether or not he was guilty of negligence in the sense in which the plaintiff uses the word "guilty."

The rule governing this case, and which, it is submitted, should control its decision, is that stated in the case of English *vs.* Chicago, Milwaukee & St. Paul R. R. Co., 24 Fed. Rep., 906, "*where a servant has equal means of knowing the danger so that the master and servant stand equal in that respect, and the servant is not specifically commanded as to the time and manner in which the work may be done, but is told to do a particular thing, and has such discretion that he can have some control over the means, time and manner of doing the work, then unless he does it in a way and with the means which will be the safest he is guilty of contributory negligence.*"

None of the ingenious hypotheses of counsel for the plaintiff in error or the arguments constructed upon them tend to show that this rule is not applicable and should not govern. Going over and down a car by use of a defective ladder, it needs no argument to prove, is not the safest way and means of getting to the next car when there is a vertical brake by his side which can be used with safety.

The court below properly considered this as controlling, and directed a verdict for the defendant. This verdict should be sustained.

A. H. WINTERSTEEN,
WAYNE MACVEAGH,
For Defendant in Error.